IN THE

Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

vs.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ, President of the Senate; HONORABLES BENJ. L. ROSENBLOOM, ELMER HOUGH, W. H CARTER, W. F. BURGESS, ROBERT L. GREGORY, M. K. DUTY, WARREN MILLER, RAYMOND DODSON, W. P. McAVOY, J. E. FRAZIER, J. W. LUTHER, W. P. HAWLEY, C. C. COALTER, MARTIN V. GODBEY, A. R. MONTGOMERY, GORY HOGG, H. G. VENCILL, E. H. MORTON, FRED L. FOX, SCOTT C. LOWE, CHARLES A. SINSEL, ROY E. PARRISH, WALLACE B. GRIBBLE, RICHARD E. TALBOTT, GOHEN C. ARNOLD, S. O. BILLINGS, S. L. COBUN, FRANK BECKWITH, G. K. KUMP, Senators of the State of West Virginia; HONORABLE JOSEPH S. THURMOND, Speaker of the House of Delegates; HONORABLES CLYDE POLING, HARRY P. HENSHAW, JOHN N. PARKS, LUTHER R. JONES, LEE RADER, L. T. HARVEY, T. J. MAHAN, W. C. W. RENSHAW, JOHN L. CONNOR, A. J. BAXTER, W. N. CLAY, KENNA LESTER, PAUL HARDMAN, A. K. FLEMING, J. ALFRED TAYLOR, CHARLES J. MASSAU, GEORGE H. SKAGGS, J. WILBUR DAVIS, E. E. COTTRELL, P. A. DIXON, A. B. C. BRAY, W. W. CARDER, J. NESS PORTER, J. D. CHIPLEY, S. R. HARRISON, JR., JOHN MOORE,

GEORGE W. STURM, LOUIS A. JOHNSON, KENNA CASTO, EVERETT HUGHES, MILTON BURR, L. V. KOONTZ, J. F. BOUCHELLE, ANGUS W. McDONALD, JOHN PATRICK, O. F. PAYNE, A. W. PRICE, JAMES BASSEL, CHARLES CABELL, ROBERT BLAND, IRA A. AKINS, FRANK C. HAYMOND, E. O. MURRAY, C. H. HUNTER, GEORGE W. BYRNES, PAT M. WILSON, W. D. CURRY, R. B. FERGUSON, W. B. HONAKER, A. F. WYSONG, S. N. MOORE, JOSEPH B. STRATTON, WM. S. JOHN, PERRY C. McBEE, CLARENCE SYMNS, W. H. SOMERS, HARVEY HAGERMAN, E. HOWARD HARPER, J. BUELL SWOPE, FLOYD WALDRON, W. G. GRAVES, J. E. EMSLEY, W. T. OTTO, HARRY A. WEISS, N. PRICE WHITAKER, G. A. HINER, GILBERT D. SMITH, B. M. YEAGER, W. H. GLOVER, LEROY SHAW, C. W. TAYLOR, C. L. HEABERLIN, V. E. SULLIVAN, E. H. ARNOLD, JAMES W. WEIR, B. R. TWYMAN, A. M. HERSMAN, G. T. SARVER, A. A. RIDDLEBARGER, J. SIDNEY BURDETT, H. R. WERNER, F. R. HICKMAN, JOHN B. HILLEARY, W. K. FERGUSON, F. W. TERRILL, W. T. TALBOTT, SEPTIMUS HALL, J. FRIEND ALLEY, S. F. WELLS, W. D. PRICE, P. F. WELLS, JOHN D. SWEENEY, and A. J. MULLENS, Members of the House of Delegates of the State of West Virginia,

DEFENDANTS.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Commonwealth of Virginia, by John Garland Pollard, her Attorney General, moves for leave to file a petition for a

writ of mandamus hereto annexed, and further moves that a rule be entered and issued directing the said Wells Goodykoontz, President of the Senate; Honorables Benj. L. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George E. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symns, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett,

H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney, and A. J. Mullens, Members of the House of Delegates of the State of West Virginia, to show cause why a writ of mandamus should not issue commanding the said Honorable Wells Goodykoontz, President of the Senate; Honorables Benj. L. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, A. H. Morton, Fred L. Fox, Scott C. Lowe, Charles Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat. M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symns, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price

Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney, and A. J. Mullens, Members of the House of Delegates of the State of West Virginia, forthwith and at the present session of the Legislature to assess and levy a tax upon the property within the State of West Virginia, sufficient to provide for the payment of the decree and judgment of this Court, entered on June 14, 1915, in favor of the Commonwealth of Virginia, in the suit of Virginia against West Virginia, for $12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of 5 per centum per annum, and costs, according to the terms of the said judgment, unless the Legislature shall forthwith and at its present session make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash, and costs, according to the terms of the said judgment, and for such other and further relief in the premises as shall seem just and meet. The said motion will be based upon the said decree and judgment entered as aforesaid, and on the petition and answer on the motion for a writ of execution heretofore made on June 5, 1916, and on the facts stated in the annexed petition and the exhibits filed therewith.

Respectfully,

COMMONWEALTH OF VIRGINIA,

By JOHN GARLAND POLLARD,
Attorney General of Virginia.

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

vs.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ, President of the Senate; HONORABLES BENJ. A. ROSENBLOOM, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. M. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy, E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; HONORABLE JOSEPH S. THURMOND, Speaker of the House of Delegates, HONORABLES Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F.

Payne, J. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat. M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symns, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney, and A. J. Mullens, Members of the House of Delegates of the State of West Virginia,

DEFENDANTS.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of the Commonwealth of Virginia by John Garland Pollard, her Attorney General, shows to the Court that:

I.

The Commonwealth of Virginia filed a Bill in this Court on leave on February 26, 1906, against the State of West Virginia, praying that the State of West Virginia's proportion of the public debt of Virginia, as it stood prior to 1861, be ascertained and satisfied.

II.

On June 14, 1915, this Court entered its decree and judgment in the suit as follows:

"SUPREME COURT OF THE UNITED STATES

Original No. 2. October Term, 1914.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs.

STATE OF WEST VIRGINIA, *Defendant.*

"This cause came to be heard on pleadings and proofs, the reports of the Special Master and the exceptions of the parties thereto, and was argued by counsel.

"On consideration whereof, the Court finds that the defendant's share of the debt of the complainant is as follows:

"Principal, after allowing credits as stated, $4,215,622.28; interest from January 1, 1861, to July 1, 1891, at four per cent per annum, $5,143,059.18; interest from July 1, 1891, to July 1, 1915, at three per cent per annum, $3,035,248.04, making a total of interest of $8,178,307.22, which, added to the principal sum, makes a total of $12,393,929.50.

"It is therefore now here ordered, adjudged and decreed by this Court that the complainant, Commonwealth of Virginia, recover of and from the defendant, State of West Virginia, the sum of $12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent per annum.

"It is further ordered, adjudged and decreed that each party pay one-half of the costs.

"June 14, 1915."

III.

The said judgment and decree has ever since remained and is now unpaid. The State of West Virginia has failed to pay the Commonwealth of Virginia the same, or any part thereof, although payment has been respectfully requested by the Commonwealth of Virginia of the State of West Virginia.

IV.

The correspondence showing the request of the Commonwealth of Virginia to the State of West Virginia for the payment of said decree and judgment, and the correspondence relating to a proposed joint conference of the Debt Commissions of the two States, as suggested by the West Virginia Commission, are hereto attached and made a part of this petition.

From said correspondence it will appear:

That on October 19, 1915, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, addressed a letter to the Governor of West Virginia, requesting that provision be made for the payment of said decree and judgment.

That on October 28, 1915, the Governor of West Virginia replied that he had convened the West Virginia Debt Commission, and in conjunction with them had reached the conclusion that it would be to the advantage of both States to have a joint conference of the Commissions of the two States at the earliest date possible.

That on November 12, 1915, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, replied, suggesting that the proposed joint conference be held on November 23, 1915.

That on November 12, 1915, the Governor of West Virginia replied by telegram that he would communicate with the members of the West Virginia Commission and would later reply further, which later reply was duly received November 19th, and was to the effect that the West Virginia Commission would probably not be able to have the joint conference, or meeting, before some time early in December, of which he would advise the Virginia Commission later.

That on December 6, 1915, no further advice having been received from the Governor of West Virginia, the Chairman of

the Virginia Debt Commission addressed another letter to the Governor of West Virginia, expressing the hope that the Virginia Commission might receive a reply at an early date.

To this letter, addressed on December 6, 1915, to the Governor of West Virginia, no reply has been received.

V.

On June 5, 1916, the Commonwealth of Virginia moved the Court to issue its writ of execution directed to the Marshal of this Court against the State of West Virginia, directing the Marshal of this Court to levy upon the property of the State of West Virginia, subject to such levy, for the satisfaction of the decree and judgment in the suit of the Commonwealth of Virginia against the State of West Virginia herein above mentioned, and that the Commonwealth of Virginia be granted such other and further relief in the premises as was just and meet. This Court denied the motion for the reason stated in the opinion of the Court.

VI.

The answer and return of the State of West Virginia to the petition and motion of the Commonwealth of Virginia for a writ of execution asserted that the writ of execution prayed for by the Commonwealth of Virginia should not be issued for the following, among other, reasons, and upon the following, among other, grounds:

"Because not only presumptively, but in fact, the State of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was, and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution."

VII.

On November 14, 1916, the Virginia Debt Commission learning that the Governor of W[illegible] Virginia was about to convene the Legislature of West Virginia in extra session, through its Chairman telegraphed the Governor of West Virginia requesting him to include in the call to be issued for that purpose, as one of the matters to be considered, the settlement of the decree of this Court rendered in favor of Virginia in the suit of the State of Virginia against West Virginia, to which the Governor of West Virginia replied by telegraph, on November 15, 1916, giving as his reasons for not embodying the matter of the debt settlement in his call, that the time the Legislature would be in session was too short for a proper consideration of the matter, and, in addition, that [illegible] the second Wednesday of January, 1917, the Legislature would convene in regular session composed, with the exception of hold-over Senators, of newly-elected members to whom, as the Governor thought, the question should be submitted, copies of which telegrams are hereto annexed and made a part of this petition. Thereafter, on or about November, 1916, the Governor of West Virginia issued a call convening the Legislature of West Virginia in extra session, and did not include in said call as one of the matters to be considered, the settlement of the decree of this Court in favor of Virginia in the suit of Virginia against West Virginia. Thereafter, in November, 1916, the Legislature of the State of West Virginia met in extra session and remained in session until December 1, 1916, without giving any consideration in any respect to the settlement of said decree of this Court.

VIII.

On December 29, 1916, the Chairman of the Virginia Debt Commission, in pursuance of au[illegible]rity from that body, addressed a letter to the Governor of West Virginia requesting

him by a special message to urge upon the Legislature, soon to assemble, the prompt enactment of such legislation as may be requisite to provide the proper means for the liquidation of the decree entered against the State of West Virginia in favor of the Commonwealth of Virginia, and on said December 29, 1916, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, also addressed a letter to the President of the Senate and the Speaker of the House of Delegates of the State of West Virginia, requesting that the Legislature of the State of West Virginia at its coming session take such steps, and make such enactments as may be necessary to insure the prompt payment of the aforesaid indebtedness, to which letters the Governor of the State of West Virginia replied by a communication dated January 9, 1917, and the President of the Senate replied by communication dated January 11, 1917, respectively, copies of which letters are hereto annexed and made a part of this petition. No reply has as yet been received from the Speaker of the House of Delegates.

IX.

The West Virginia Legislature convened on January 10, 1917, and since that date has been in session at the Capitol in Charleston, West Virginia.

The Legislature of the State of West Virginia consists of the Senate and the House of Delegates.

The members of the Senate of the State of West Virginia are Honorables Wells Goodykoontz, Benj. J. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump.

The members of the House of Delegates of the State of West Virginia are Honorables Joseph S. Thurmond, Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat. M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symns, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney and A. J. Mullens.

The Honorable Wells Goodykoontz is the President of the Senate, and Honorable Joseph S. Thurmond is the Speaker of the House of Delegates of the State of West Virginia.

X.

It was the absolute ministerial duty of the Legislature of the State of West Virginia, and of the aforesaid Senators and

Members of the House of Delegates thereof, to take the necessary steps and make the necessary enactments to provide for the payment of the said judgment of $12,393,929.50, with interest and costs as provided in said judgment, upon the convening of said Legislature on January 10, 1917, but, although respectfully requested to do so by your petitioner, the Legislature and the members thereof have taken no step and have made no enactment to provide for, or insure payment of the aforesaid indebtedness. Nor have any steps been taken by the Legislature, or the Senate, or the House of Delegates to give any indication, or hope that the Legislature will, or intends to make provision for the payment of said indebtedness. On the contrary the Governor of West Virginia, in a special message on the "Virginia Debt," submitted to the Legislature of that State on January 18, 1917, a copy of which is attached hereto, recommended that the Legislature

> "present to the Court a petition for a re-hearing of the matter of the interest upon the debt";

and further recommended that

> "Provision should be made also by the Legislature for having presented to the Supreme Court of the United States the contentions of West Virginia as to why Virginia should be restrained from pressing her claim against West Virginia further, until the State of Virginia sues in the Court of Claims, as I am informed she can, for the purpose of recovering her claim growing out of the cession of the Northwest Territory, and thereby reducing the joint assets of the two States to a common fund, which will place the States in a position to receive their proportionate credits and to end further litigation."

And concluded with the expression of the hope

> "that some suggestion will be forthcoming that will result in the protection of the interests of our State in this litigation, and bringing about the consideration of further

equities which West Virginia is entitled to receive, and after the proper equities have been conceded to the State, the prompt liquidation of the residue, if any there be."

XI.

Under the Constitution of the State of West Virginia the session of the Legislature now convened will be adjourned on or before the 24th day of February, 1917, unless, by the concurrence of two-thirds of the members elected to each house, its session shall be further continued beyond said date; and the Legislature must assemble biennially and can not assemble oftener unless convened by the Governor.

In consequence of the time which has already elapsed without any effort being made by said Legislature to perform its duty in the matter of making provision for the payment of the said decree and judgment, there will be insufficient time therefor unless the Legislature promptly, and without further delay performs its said duty.

Your petitioner avers that it is not the intention of the authorities of West Virginia to take any steps by legislation, or otherwise, to make provision for the payment of the said judgment and decree, but that it is the intention to delay making provision for such payment under the pretexts set forth in the letter from the Governor of West Virginia dated January 9, 1917, and in the special message submitted to the Legislature of that State on January 18, 1917, copies of which are hereto attached, until it will be too late for the Legislature of West Virginia now assembled to take any action in the premises.

It is further averred that your petitioner is without remedy in the premises unless this Court shall command the Senators and Members of the House of Delegates of the State of West Virginia to assess and levy a tax upon the property in the State of West Virginia to provide for the payment of said judgment and decree according to the terms thereof, as they are in duty bound to do.

WHEREFORE, your petitioner, Commonwealth of Virginia, prays that a rule be made and issued from this Court, directed to the said Honorable Wells Goodykoontz, President of the Senate, Honorables Benj. L. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Coburn, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles K. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symns, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman,

G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney and A. J. Mullens, Members of the House of Delegates of the State of West Virginia, to show cause why a writ a mandamus should not issue commanding the said Honorable Wells Goodykoontz, President of the Senate, Honorables Benj. L. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Coburn, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat. M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symns, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E.

Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney and A. J. Mullens, Members of the House of Delegates of the State of West Virginia, forthwith and at the present session of the Legislature to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said Judgment of $12,393,939.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent per annum, and costs, according to the terms of said judgment, unless the Legislature shall forthwith and at its present session make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash, and for such other and further relief in the premises as shall seem just and meet; and your petitioner will ever pray, etc.

COMMONWEALTH OF VIRGINIA,

By JOHN GARLAND POLLARD,

Attorney General of Virginia.

EXHIBITS

OCTOBER 19, 1915.

Honorable H. D. Hatfield, Governor of West Virginia, Charleston, W. Va.

DEAR SIR:—In the hope that the State of West Virginia would provide for the payment of the amount of the judgment, viz: $12,393,929.50 with interest, entered against it by the Supreme Court of the United States in favor of the State of Virginia, we have postponed making any formal request.

We have recognized and have appreciated the fact that your State may need reasonable time in order to make the financial arrangements necessary for compliance with the decree of the Court; and any request for such delay will be responded to in the spirit which should govern one State in dealing with another.

Nothing, however, having been done by your State, so far as we are advised, we feel constrained to call the matter to your attention.

Action by the Legislature of your State, will, of course, be necessary in order to comply with the Court's decree, and as we are informed unless convened in extraordinary session upon the call of Your Excellency, there will be no session of that body until January, 1917. To postpone until then the beginning of such action as may be necessary to carry out the decree of the Court would involve unreasonable delay. We, therefore, on behalf of the State of Virginia, which we represent, respectfully request the State of West Virginia to perform the Court's decree, and to that end that Your Excellency will, in the exercise of the power vested in you, convene the Legislature of your State in extraordinary session for the purpose of dealing with this important subject, and making provision for the payment of the decree.

We will be indebted to you if you will, at your early convenience, communicate your reply to this letter to the undersigned, Chairman of the Virginia Commission, at Front Royal, Virginia.

Very truly yours,

H. H. Downing,
Chairman, Virginia Commission.

28" October, 1915.

My Dear Sir:—Upon the receipt of your very courteous letter of the 19th inst. relative to the payment of the judgment of the Commonwealth of Virginia against the State of West Virginia, recently rendered by the Supreme Court of the United States, I convened the West Virginia Debt Commission, and, in conjunction with them, have reached the conclusion that it would be to the advantage of both States to have a joint conference of the two commissions at the earliest date possible.

In the hope that you will give me your views and wishes, and the views and wishes of your Commission upon this subject, at your earliest convenience, I remain,

Yours sincerely,

(signed) Henry D. Hatfield,
Governor of West Virginia.

Honorable H. H. Downing, Chairman Debt Commission, Front Royal, Virginia.

WASHINGTON, D. C., NOVEMBER 13, 1915.

Hon. Henry D. Hatfield, Governor of West Virginia, Charleston, W. Va.

DEAR SIR:—I duly received your letter of the 28th ultimo in response to mine of the 19th in relation to the payment of the judgment of the Commonwealth of Virginia against the State of West Virginia recently rendered by the Supreme Court of the United States, and note that, upon consideration thereof, you, in conjunction with the West Virginia Debt Commission had reached the conclusion that it would be to the advantage of both States to have a joint conference of the two Commissions at an early date.

Your letter has been considered by the Virginia Debt Commission, and I am instructed by them to say that they will be pleased to meet you and the West Virginia Debt Commission as requested, and receive and consider any communication you may desire to submit; and the Virginia Commission agreeing with your view that this conference should be held at the earliest possible date, I suggest the 23rd day of November at 10 A. M., and The New Willard, Washington, D. C., as the time and place of such meeting.

Respectfully,

(signed) H. H. DOWNING,
Chairman, Virginia Debt Commission.

Kindly send
reply to
Front Royal, Va.

TELEGRAM

CHARLESTON, W. VA., 11/13/15.

Hon. H. H. Downing,

Your letter of this date to hand and contents noted. I will communicate with you just as soon as I have had opportunity to hear from other members of the West Virginia Commission.

(signed) H. D. HATFIELD.

TELEGRAM

64 pd. Blue Day Letter.

11/19/15 CHARLESTON, W. VA.

Hon. H. H. Downing, Front Royal, Virginia.

Replying further to your telegrám of some days ago, suggesting joint conference of two commissions in Washington on November 23rd, beg to advise that I find it impossible to arrange meeting of West Virginia Commission on that date. Will probably not be able to have meeting before some time early in December, and will advise you later as to date agreeable to West Virginia Commission.

(signed) HENRY D. HATFIELD,
Governor.

Virginia *vs.* West Virginia

DECEMBER 6, 1915.

Hon. Henry D. Hatfield, Governor of West Virginia, Charleston, W. Va.

DEAR SIR:—Since your wire of November 19th, I have heard nothing from you with reference to a meeting of the Commissions of Virginia and West Virginia, as requested by you some time since. Your wire of the 19th of November stated

"Will probably not be able to have meeting before some-
"time early in December. Will advise you later as to date
"agreeable to the West Virginia Commission."

My commission had hoped to hear from you before this, and regret that no time, as yet, has been fixed for the conference. May I hope to hear from you at an early date?

Yours very respectfully,

(signed) H. H. DOWNING,
Chairman Va. Commission.

D/K

TELEGRAMS

NOVEMBER 14th, 1916.

Honorable H. D. Hatfield, Governor, Charleston, West Virginia.

We are informed that you contemplate convening the Legislature of West Virginia in extra session, and I beg to request on behalf of the Virginia Debt Commission, that you will include in the call to be issued for that purpose, as one of the matters to be considered, the settlement of the decree of the Supreme Court of the United States rendered in favor of Virginia, in the Suit of Virginia against West Virginia.

H. H. DOWNING,
Chairman, Virginia Debt Commission.

CHARLESTON, W. VA., 15th NOV., 1916.

H. H. Downing, Chairman, Virginia Debt Commission, Lynchburg, Va.

Your message received relative to including Virginia Debt matter in special call in case Legislature of West Virginia is convened in extraordinary session. The tenure of office of members of old Legislature expires December first, 1916, and short time in which Legislature could be in session, ten days, will not be long enough for proper consideration of Virginia Debt matter, in addition to other questions with which it must necessarily deal. In addition to this on second Wednesday in January, 1917, a Legislature will convene composed with exception of hold-over senators of members newly elected by the people, and to them, in my judgment, rather than to the old Legislature, this question should be submitted.

H. D. HATFIELD,
Governor.

8:37 A. M.

DECEMBER 29th,
1916

Virginia *v.* West Virginia.

To His Excellency, Governor of the State of West Virginia.

DEAR SIR:—The Commission, of which I am chairman, hopes that at the coming session of the Legislature of West Virginia, it will provide the proper means for the liquidation of the decree entered against the Commonwealth of West Virginia in favor of the Commonwealth of Virginia.

As the session of the Legislature will be a short one, it is most important that that body shall at once initiate such proceedings as will assure whatever legislation will be necessary before its adjournment.

The Commission, therefore, respectfully requests that you will, by a special message, urge upon the Legislature, the prompt enactment of such legislation as may be requisite.

I have the honor to be

Your obedient Servant,

H. H. DOWNING,
Chairman, Virginia Debt Commission.

DECEMBER 29th,
1916

Virginia *vs.* West Virginia

To

President of the Senate, West Virginia.

To

Speaker of the House of Delegates, West Virginia.

GENTLEMEN:—As you are doubtless aware, the Supreme Court of the United States, on the 14th day of June, 1915, entered its decree against the Commonwealth of West Virginia in favor of the Commonwealth of Virginia, for the sum of $12,393,929.50, with interest from July 1, 1915, at the rate of five per cent per annum, and one-half of the costs.

No payment whatever has been made of any portion of this decree, although the Commission which I represent has endeavored to the best of its ability to bring about a settlement.

The Commission respectfully begs that the Legislature of West Virginia, at its coming session, will take such steps and make such enactments as may be necessary to insure the prompt payment of the indebtedness.

I have the honor to be

Your obedient Servant,

H. H. DOWNING,
Chairman, Virginia Debt Commission.

9th January, 1917.

Honorable H. H. Downing, Chairman, Virginia Debt Commission, Front Royal, Virginia.

Dear Sir:—Your letter of the 29th instant, expressing the hope of the Virginia Commission that the West Virginia Legislature will, at its coming session, provide for the liquidation of the judgment in favor of the former State against the latter, and requesting that I urge this matter by special message upon the West Virginia Legislature, has been received and considered.

My regular biennial message has been prepared and will be transmitted to the Legislature to-morrow, and I have promised therein that I will, within a few days, address that body specially upon the subject of the Virginia debt; so you will see I have not been and am not unmindful of my responsibilities as Governor in this matter.

I have no doubt that the Legislature will, early in its coming session, give this matter its most serious attention. There are many, however, judging from the expressions that come from our people, who feel that West Virginia has not received all the credits to which she is entitled at the hands of Virginia. It has indeed been hard for West Virginia to obtain data from which to present her credits on account of your Commission, and those who represent the State of Virginia, being unwilling, up to the present time, to give West Virginia any assistance in this regard looking to much in evidence when the attention of the Virginia Commission was called to the assets which Virginia had disposed of in some instances and which in other instances had been kept in her possession at the joint meeting of the two Commissions in Washington on March 4th, 1914, which the Supreme Court, as you are aware, recognized. For this reason many of the credits which were suggested by West Virginia were not recognized by the Supreme Court on ac-

count of the lack of data and information which it was impossible for West Virginia to obtain to support its contentions. The people of West Virginia, therefore, feel that they are entitled to greater credits, and in discussing this matter, no criticism is intended of the Supreme Court. It will be seen that the claim hereafter referred to could not, at the time the supplemental was filled, upon which the case was reopened, have been presented to the Court, and in consequence the Court could not and did not consider it. The Court always heard us with patience and courtesy, and brought to bear upon the question involved an ability that challenged our admiration.

The claim was one for negotiation between the Commissions and not a matter for adjudication. Therefore, we must not be misunderstood upon this point.

Neither is it my intention to challenge, directly or indirectly, or by remote insinuation, even the jurisdiction of the Court. It has constitutional powers which I respect; it has exercised them in a matter which I also respect. But there can be no harm in voluntary adjustment between the parties even after judgment.

I refer to the claim of Virginia against the Government of the United States growing out of the cession of the Northwest Territory, in which West Virginia should participate in the same ratio that she is compelled to contribute to the payment of the Virginia debt. You and your commission are doubtless familiar with this claim, because the records of your State evidence it, and a message of at least one of your Governors has called the attention of the General Assembly of your State to it specifically and in detail. I refer to the message of Governor Swanson of January 24, 1910. (See Senate *Journal* and Documents, Virginia, 1910.)

In brief the claim, as I understand it, is as follows:

Prior to the adoption of the articles of confederation entered into by the thirteen original states, Maryland refused to sign

the same, unless and until those states holding western territory should surrender the same to the United States. The State of Virginia at the time laid claim to all that territory lying northwest of the Ohio River out of which the states of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota have since been formed; and, by an act of her General Assembly passed at a session beginning on the 20th day of October, 1783, and for the purpose of expediting the establishment of the proposed confederation, authorized her delegates in Congress to convey to the United States in Congress assembled all her territory northwestward of the Ohio River, and, on the first day of March, 1784, her delegates in Congress, consisting of Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, and pursuant to the act of October 20th, 1783, presented a deed to Congress ceding all of the territory of Virginia northwestward of the Ohio River to the United States upon certain terms, conditions and trusts therein set forth, which deed of cession was accepted according to its terms, and directed to be recorded and enrolled among the Acts of the United States in Congress assembled. Among the conditions set out in the deed and accepted by Congress was the following:

> "(F). That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose and for no other use or purpose whatsoever."

It further appears from the requisitions made by Congress upon the thirteen states at the time of this cession that Virginia's "usual respective proportion in the general charge and expenditures" was about one-seventh of the whole; and it seems to be also conceded that the moneys derived from a sale of the lands embraced in this cession were to be applied to the extinguishment of the public debt incurred in the war of the Revolution, which debt was finally paid; so that, after this part of the trust had been met and certain other conditions of the deed not necessary to mention had been performed, the residue of the trust fund should have been applied to the reserved interests of the states set forth in article (F) of the deed, Virginia included, and to *"no other use or purpose whatsoever."* Instead of doing this, however, Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms.

The total acreage embraced, according to governmental surveys, in the cession amounted to 170,208,613 acres, and out of this Congress seems to have donated to local uses, contrary to the deed, 38,864,189 acres, which, valued at $2 per acre, the price fixed by Congress when these lands were offered for sale by the act of May 18, 1796, would amount to $77,728,378. In addition to this, proceeds of the sales of lands amounting to $2,953,654.70 were likewise donated to local uses, making an aggregate of donations contrary to the deed of $80,682,038.70.

In addition to this, my information is that the trust has not even yet been entirely administered, but that there remains on hand undisposed of, several thousand acres of land, which fact would seem without question to evidence the equity of Virginia's claim against the Federal Government. But, disregarding the value of these lands, or considering them along with the values of the local donations above ascertained, and allowing unto Virginia one-seventh thereof as her residuary interest in the trust,

there would be due and payable from the Government of the United States to the State of Virginia at least $11,526,004.67, in which West Virginia should share in the same ratio that she is compelled to contribute to the payment of the Virginia debt. Her equitable proportion of the Virginia debt has been ascertained by the Court to be 23½ per cent of the whole debt, and if she were allowed in turn 23½ per cent of the amount ascertained to be due from the United States to Virginia, to which the records disclose that Virginia is entitled, it would go a long way toward the complete liquidation of West Virginia's part of the public debt.

It is easy for you to understand, it seems to me, the unfair position which West Virginia has occupied in the matter of financial relations with Virginia, for the reason that Virginia has had all of the assets in her control and utilized them to her own benefit, as she has had the control of the claim which she has against the Federal Government, with very little recourse upon the part of West Virginia to obtain evidence from the records of Virginia with which to prove conclusively her contentions in these equities which are jointly owned by the two States.

A critical examination, therefore, of this question would, in all human probability, develop a much larger credit in the favor of Virginia against the Federal Government in this equity of which she has full possession in the way of facts and data.

It will be seen at a glance why this matter was not and could not have been presented to the Supreme Court for adjudication. The existence and amount of this claim could not have been ascertained in a suit to which the Government of the United States was not a party, and there seems to be no authority for making it a party defendant to a suit pending in the Supreme Court of the United States upon the motion of a state or any one else, whatever might be done in the Court of Claims. Indeed, Senator Chilton, of this State, has been for some time seeking the passage of a bill by Congress giving any state the

right to sue the Government of the United States in the Supreme Court thereof, and this might have remedied the situation; but the bill still stands upon the calendar unpassed. Hence, West Virginia's position is again very much handicapped in pushing her claim in an equity which she is entitled to have considered.

You will see, therefore, that this is a matter purely for negotiation between the State of Virginia and her bondholders, upon the one side, and the State of West Virginia upon the other, and until the same shall have been thrashed out, our people, I fear, will not be satisfied.

I have written thus fully in order that I might give you, if possible, the atmosphere surrounding this question, in reply to your letter reminding me of the matter in which Virginia and West Virginia are jointly interested in the settlement of financial difficulties which have existed since 1861, or the division of the States. The sooner these matters are dealt with frankly upon the part of both States and due consideration given and facts furnished so that the proper credits, as well as the evidence supporting the same, the sooner, in my humble judgment, will a rightful and just conclusion be reached, which will end this long-drawn-out controversy, which has indeed been embarrassing and expensive for both parties concerned.

Yours very truly,

(signed) HENRY D. HATFIELD,
Governor of West Virginia.

HDM:MP.

JANUARY 11, 1917.

IN RE: *Commonwealth of Virginia*
vs. *State of West Virginia.*

H. H. Downing, Esq., Chairman, Virginia Debt Commission, Front Royal, Virginia.

DEAR SIR:—Your letter of the 29th ult. addressed to the President of the Senate and the Speaker of the House of Delegates, jointly, has been delivered to me. I am informed that Governor Hatfield has written you or some other member of your Commission on this subject. I understand the Governor intends to present the subject of the claim to the Legislature for consideration at an early date.

With assurances of my kindest regards, I remain,

Yours most truly,

(signed) PRESIDENT OF THE SENATE.

WG:EW

To the Members of the Senate and House of Delegates:

In my biennial message I promised to send to your honorable bodies a special message dealing with the subject of the Virginia Debt. In a special message to the Legislature of 1915, I submitted the findings of Master Littlefield, which were the result of the re-opening of the case, as prayed for by the representatives of West Virginia, in March, 1914, for the purpose of having considered certain credits which had not been presented or considered in the litigation of this important subject. At this time I am in position to give to you the final word of the Supreme Court, sustaining in part the contentions that were made in West Virginia's supplemental answer, which credits awarded by the Court went to the reduction of the principal and interest of the original decree entered against West Virginia in March, 1911.

It is my purpose to give to you briefly such facts in relation to this ante-bellum controversy as will give you the origin, history and present status of the litigation between the two states growing out of the borrowing of certain amounts of money for internal improvements in the name of the state before its division.

As early as the year 1822 the old Commonwealth of Virginia (that is, the Virginia before West Virginia was established as a separate state) engaged in a system of internal improvements, consisting of railroads, canals, turnpikes, bridge companies and banking institutions, and she kept up her subscription thereto and construction thereof until the year 1861. In some instances she subscribed two-fifths, until the year 1858, of the capital stock of these improvements, and from 1858 to 1861 three-fifths of a contemplated railway or canal or other improvements, and issued and sold her interest-bearing bonds, and paid such subscriptions out of the proceeds of these sales. In this way she incurred a heavy bonded indebtedness

and acquired many large and valuable holdings. Her declared policy was to devote the securities thus acquired to the payment of the debt thus incurred, but this policy was later disregarded.

In this manner most of the railroads that now traverse the present Commonwealth of Virginia, such as the Virginia Central Railroad, running from Richmond to Covington, Virginia (now constituting a part of the Chesapeake & Ohio); the Virginia and Tennessee Railroad, extending from Lynchburg, Virginia, to Bristol, in that state; the Southside Railroad, running from Lynchburg to Petersburg and the Norfolk and Petersburg Railroad from the latter point to Norfolk, (being a part of the Norfolk & Western Railway system); the Orange & Alexandria; the Richmond, Fredericksburg & Potomac; the Manassas Gap; the Richmond & Danville Railroad; as well as the James River and Kanawha Canal, running from the mountains to the sea, and numerous other shorter and less important canals, such as the Dismal Swamp Canal, etc., were built, and in addition the establishment of five banking institutions was carried out.

In 1861, she owned in part and controlled the whole of these public improvements, and her bonded debt incurred in their construction had reached, for the purpose of the debt hereinafter discussed and the litigation that subsequently took place between the two states, the enormous sum of $33,879,073.82, which was later reduced by the Supreme Court to $30,563,-861.56. The Civil War was on, and on the 17th day of April, 1861, the State of Virginia seceded from the Union. A great majority of her citizens, however, living west of the Alleghenies, did not believe in secession, and immediately took steps to support the cause of the Union, and to carve a new state out of the old commonwealth that would adhere to the union and support its cause, and for the further purpose of developing the vast natural resources hidden in the wilderness of the territory of the commonwealth of Virginia which had been so long neglected

by those who controlled the affairs of the mother state. They met in convention and adopted the constitution of 1862, and in consequence of the Enabling Act of Congress, passed on the 31st day of December, 1862, were admitted into the Union, and on the 20th day of June, 1863, as a new state bearing the name of "the State of West Virginia."

The Commonwealth of Virginia, by an ordinance adopted by her state constitutional convention, August 20, 1861, providing for the formation of the state of West Virginia, and looking to the payment of the debt of the Commonwealth of Virginia, adopted among other things this ordinance prescribing specifically the manner of settling the debt, to-wit:

> "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new state during the same period. * * * * * *"

The constitution of West Virginia was prepared and proposed by a convention which met at Wheeling on the 26th day of November, 1861, and, with a view of declaring West Virginia's willingness to assume an equitable proportion of the debt, contained as section eight of article eight the following:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this state; and the legislature shall ascertain the same as soon as practical and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal thereof within thirty-four years."

It will be observed that this section of the constitution of West Virginia provides for the assumption by this state of an equitable proportion of the public debt of Virginia existing prior to the first of January, 1861, and the ordiance above referred to, commonly known as the "Wheeling Ordinance," does the same thing and in addition thereto prescribes the manner of settlement. There is no difference in substance between the obligation imposed by this ordinance and the promise made by the constitution. The ordinance expressed the will of the people of Virginia speaking through their convention. The people of the proposed new state afterwards adopted this constitution and agreed to pay an equitable proportion of the debt. Taking the ordinance adopted by the convention and the section of the constitution of West Virginia together, there is no conflict nor room for misunderstanding.

Prior to the decision of the Supreme Court of the United States the contention of West Virginia had always been that the just and equitable proportion of the debt should be ascertained in the manner provided by the "Wheeling Ordinance," but Virginia afterward sought to depart from this method and assumed that West Virginia should pay one-third of the debt. The Supreme Court took a different view and decided that the equitable proportion of the debt assumed by West Virginia should be ascertained by the relative valuation of the real and personal property of the two states at the time of the creation of the State of West Virginia.

During the war West Virginia could not have negotiated with Virginia for the settlement of this debt because they were armed against each other, one in support of the union, and the other in opposition, and for West Virginia to have negotiations with Virginia under such circumstances, and especially to have paid her any money with which to carry on the war against the national government, would have been considered in the light of treason. So that, during this period, no settlement could

or did take place in keeping with the constitutional promise as made and hereinbefore referred to.

At the close of the war Virginia instituted a suit against West Virginia in the Supreme Court of the United States, claiming that the counties of Jefferson and Berkeley in the eastern panhandle belonged to her instead of the new State, and during this legal controversy no settlement could be reached because the integrity of West Virginia was attacked, and until the conclusion of the suit she could not tell of what counties she was composed or what proportion of the debt would, under the circumstances, equitably be hers. This suit pended until sometime in 1871.

In 1871 Governor Jacobs, of West Virginia, pursuant to an act of the Legislature, appointed what is known as the Bennett Commission, to negotiate with Virginia concerning the debt, with the purpose of ascertaining from Virginia a true and actual statement of the joint obligation and assets, so that West Virginia might know her status in the way of obligation, if any, after the proper credits had been applied which she was entitled to receive upon such obligation that might be justly hers by reason of the promise made in the Constitution of 1862, but Virginia declined to receive this commission or furnish a statement of the account between the two states, and the matter remained without adjustment. It should be noted that the decree dismissing Virginia's suit against West Virginia relating to the counties of Berkeley and Jefferson was entered March 6, 1871. On the 24th day of February, prior to this and in contemplation of the termination of this suit, West Virginia, desiring to have a settlement with Virginia, passed an act authorizing the appointment of commissioners to treat with Virginia on the subject. The state of Virginia, by a resolution passed on the 30th of March, 1871, instead of appointing a commission to meet the one authorized by the State of West Virginia, not only ignored the resolution adopted by the State of West

Virginia, but proceeded to negotiate with her creditors and make a settlement with them, assigning one-third of the debt to West Virginia, thus arbitrarily attempting to settle the whole question without regard to West Virginia.

This would seem to have been an opportune time to have settled this much controverted case. The suit between Virginia and West Virginia was just ended, leaving the parties free to make settlement; but instead of settling with West Virginia, Virginia assumed to make a settlement without consulting the State of West Virginia, and, this being done, was content to permit the matter to rest for many years.

Later on, Virginia appointed a commission, with power and directions to arrange terms with West Virginia, but made it a condition precedent in all negotiations that West Virginia should recognize that Virginia only owed two-thirds of the debt, and that West Virginia owed the remaining one-third, together with the interest charged from January 1, 1861, and this in turn prevented a settlement for the reason that West Virginia felt that Virginia's representatives were attempting to find the award against West Virginia before the arbitrators had any opportunity to discuss any phase entering into an equitable adjustment of the public debt of Virginia.

In the meantime Virginia appointed another commission and approached West Virginia for a settlement, but the latter firmly refused to recognize any liability upon her part. During what was known as the funding period, when she arbitrarily reduced her diet, both as to principal and interest, Virginia arbitrarily set aside one-third of the public debt and charged it to West Virginia, and issued what are known as "West Virginia Certificates" therefor, and certain holders of her bonds surrendered the same to be held by Virginia, and took in lieu thereof the West Virginia certificates, which were accepted by Virginia's creditors and relieved them of a like burden. Certain agreements were made and entered into by Virginia and her creditors

as to the protection the mother state would give these creditors for certain privileges and favors bestowed upon her. In the year of 1894 a joint resolution was passed by the general assembly of Virginia providing for the settlement of the controversy between Virginia and West Virginia, and the bond holders agreed at that time to save Virginia harmless from expenses of all litigation between the two states and Virginia gave her consent and name in the institution of the suit against West Virginia in favor of her bondholders, and finally Virginia, on the 26th day of February, 1906, instituted suit against West Virginia in the Supreme Court of the United States, for the recovery from West Virginia of one-third of the debt, in keeping with her obligation and pre-arrangement with her creditors who held these certificates.

The suit was based upon the constitutional promise of West Virginia made when she was admitted into the union, under Section 8 of Article 8 of the Constitution of 1862. The arrangement previously made between the state of Virginia and the West Virginia certificate holders, who accepted these certificates in lieu of certain obligations these certificate holders held against Virginia, was that these certificate holders should receive from Virginia in full settlement thereof whatever amount she might recover from the state of West Virginia.

The litigation began during the administration of Governor William M. O. Dawson, and while the Honorable Clark W. May, now deceased, was Attorney General. Able counsel, both within and without the State, were employed to assist Attorney General May, and the battle waged during the residue of Governor Dawson's term, and was still pending when Honorable William E. Glasscock became Governor of West Virginia, the honorable W. G. Conley having succeeded Mr. May as attorney general; and the battle went on until the 6th day of March, 1911, when the supreme court announced that West Virginia's equitable proportion of the principal of the Virginia debt

amounted to $7,182,507.46, but left the question of interest open and suggested that the two states confer through representatives properly raised to represent them, and in response to this suggestion the legislature of West Virginia established a commission with directions and authority to the governor to appoint its members.

Va. *vs.* W. Va., 220 U. S. 1 (55 L. Ed. 353).

Such is a brief history, and was the status of this now famous case when I, on the 4th day of March, 1913, became governor of the State of West Virginia and the present administration began. I at once appointed a debt commission, pursuant to the joint resolution of the two houses of the Legislature, and through this commission negotiations were at once begun with the Virginia commission looking to a settlement of the controversy. But the Virginia commission, at the conference held between the two, positively declined to discuss or consider any question other than that of interest upon the principal as ascertained by the court, and an adjournment of the joint conference necessarily followed.

West Virginia originally defended the suit brought against her by the State of Virginia in the Supreme Court of the United States on the theory that the settlement between the two states would be made upon the basis of the Wheeling ordinance and, that it was not necessary in such proceeding to consider any equities that the state of West Virginia might have in the stocks and bonds bought by the commonwealth of Virginia and loans made by her out of the proceeds of these bonds; but when the supreme court decided that the settlement should be made upon a different basis, then it became necessary for West Virginia to take credit for whatever the commonwealth of Virginia had received arising from the proceeds of the sale of these bonds; that is to say, West Virginia, being liable for 23½ per cent of the bonds, as found by the supreme court, would also

be entitled to 22 1-2 per cent of the proceeds arising from the sale of these bonds. It therefore became necessary for West Virginia to file a supplemental answer asking that her equities in these stocks and these lands be ascertained and credit given her therefor.

It was our contention that West Virginia was entitled to certain credits upon her part of the principal of the debt as ascertained by the supreme court, by reason of the fact that the state of Virginia had received the benefits of certain bonds, stocks and other securities purchased by her out of the proceeds of the bonds that were issued to raise the money to carry on the internal improvements from which resulted the public debt, in which benefits the state of West Virginia had not participated. Chief Accountant of the State, Mr. E. A. Dover, and his assistants, were put to work at the city of Richmond to collect as much evidence as possible in the time allowed, relating to the character, number and value of these securities. Mr. R. L. Gregory, an attorney, was also employed for the purpose of abstracting all acts and resolutions passed by the legislature of Virginia authorizing the representatives of the state of Virginia to invest in these stocks, and finally authorizing the sale of the same in part, making complete the chain of facts of undisputable equities in the way of credits to which West Virginia was entitled. Mr. Dover reported in February, 1914, and after the West Virginia commission had examined and analyzed this report, it asked for another joint conference with the Virginia commission, to be held at Washington. At this conference the West Virginia commission represented to the Virginia commission that as the state of West Virginia had been charged with 23½ per cent of the debt, as decided by the Supreme Court of the United States, March 6, 1911, they insisted that she should be credited with the same per cent of the value of the assets that had been discovered, and this would reduce, according to their contentions, the $7,182,507.46 of

principal charged by the court in decree to West Virginia, to an amount approximately $2,327,195.28. They offered to the Virginia commission to recommend to the legislature of the state of West Virginia the payment of the latter amount in full settlement of West Virginia's proportion of the debt, provided the state of Virginia would accept the same. This offer, however, was declined positively and emphatically. Indeed the Virginia commission refused to discuss it, but forthwith moved the Supreme Court of the United States to proceed with and speed the cause.

In the meantime additional counsel had been employed in the case in connection with the legal department of the state to represent West Virginia in the further defense. The counsel were John H. Holt, of Huntington, Charles E. Hogg, of Point Pleasant, and V. B. Archer, of Parkersburg, and on the 23rd day of March, 1914, the state of West Virginia, after notice to the state of Virginia, filed before the Supreme Court of the United States a motion for leave to file an amended and supplemental answer. West Virginia's answer was prepared and presented at the same time as the motion of Virginia to speed the cause, in order that the court might learn in advance the character of the answer it proposed to file. This motion and the motion made by Virginia for final decree came on to be heard together upon the 13th day of April, 1914, and both motions were elaborately argued, both orally and upon printed briefs. On the 8th day of June, 1914, the supreme court reopened the case and granted leave to the state of West Virginia to file its amended and supplemental answer and the case was re-referred to Honorable Charles E. Littlefield, of New York, former master in the case, with power and direction to hear any and all evidence that either of the states might offer before him relative to matters embraced in said answer.

Va. *vs.* W. Va., 324 U. S. 117 (58 L. Ed. 1243).

The master began his sittings in the city of Richmond and many weeks were spent before him in the introduction of evidence relative to the existence, ownership and value of various stocks, bonds and other securities that had been purchased by the state of Virginia prior to the first day of January, 1861, out of the proceeds of the sale of the bonds that evidenced the Virginia debt referred to in the West Virginia constitution, and after the evidence had been completed the case was argued before the Master in the city of New York, by counsel for Virginia, the bondholders, and for the State of West Virginia. Printed briefs were likewise submitted upon both sides.

The Master made up a report and printed the same and filed it on the 22nd day of January, 1915. In this report the Master found that West Virginia was entitled to credit upon her part of the principal of the debt amounting to $2,868,839.49, and that the original findings of the Supreme Court in consequence thereof be reduced from $7,182,507.46 to $4,313,667.97. He further found that this sum should bear interest, and gave as his reason that West Virginia had promised in her first constitution to pay an equitable proportion of an interest-bearing debt; but he did not fix any rate of interest or name any time during which it should run, because there was no fixed amount upon which interest could be computed.

Both West Virginia and Virginia filed exceptions to this report, West Virginia based her exception on two grounds; First, that the Master had reduced the value of the securities proved to be in the possession of Virginia on January 1, 1861, amounting to $20,810,357.98, to $14,511,945.74, without substantial legal proof upon the part of Virginia. Second, that it was improper and unjust that West Virginia should be held liable for interest upon a debt of which the proportionate part of the State of West Virginia had not been determined. Virginia based her exception upon the ground that the assets from which the allowed credit had been derived should be valued as

of June 20, 1863, instead of January 1, 1861. Both exceptions were of the highest importance, for if West Virginia should be charged upon the one hand with interest her indebtedness would be greatly increased, and upon the other hand, if Virginia should succeed in valuing the assets as of June 20, 1863, instead of January, 1861, the assets would be practically worthless because the war at the former date was raging in full force and proportionate interest in the securities was reduced in value.

The Supreme Court fixed the 19th day of April, 1915, as the date upon which the exceptions would be heard, and at that time they were argued both orally and upon printed briefs by counsel for both states and by attorneys representing the bondholders, with the result that on the 14th day of June, 1915, the Court rendered its opinion through Mr. Justice Hughes, practically confirming the report of the Master. This report was sent to the Legislature in its regular session of 1915, and is a part of the legislative record of that session. So that the result was that West Virginia succeeded in maintaining her credits as reported by the Master, and Virginia succeeded in sustaining the charges of interest. In other words, West Virginia reduced her part of the principal from $7,182,507.46 to $4,215,622.26, and Virginia succeeded in establishing the contentions that the principal remaining should bear interest as of January 1, 1861.

Va. *vs.* W. Va., 238 U. S. 202 (59 L. Ed. 1272).

In this connection it may be added that there are two matters involved in this history of the case that have not always been discussed in certain quarters with entire frankness. The first relates to the efforts to compromise the case, and the second to the result of the efforts of the present administration to secure credits which West Virginia was justly entitled to receive. It should be borne in mind that the commission appointed by me

to negotiate with Virginia was authorized by the legislature only after the supreme court had practically decided the case by settling the principle upon which it should be determined; and it should be further borne in mind that the commission was composed of business and professional men of both parties who brought to the discharge of their duties ripe experience and persistent industry to investigate the available sources of information and fortify themselves with every obtainable fact and make definite proposition of compromise based thereon. This the Virginia commission refused to discuss, and there was nothing left but to fight within the narrow limits that had been imposed. The Virginia representatives were relentless in their position that West Virginia was entitled to no credit or consideration in the investments that had been made by the state. They were unwilling to discuss anything that would lead up to the principal of the debt, leaving nothing but the question of interest to be discussed, notwithstanding the supreme court, by its decision in re-opening the case on West Virginia's contention that physical assets did exist, pointed out the arbitrary and unfair position that had been taken by the Virginia commission and the bondholders with respect to West Virginia, through its commission, when it asked that the entire subject be thrown open for discussion between the parties interested and that West Virginia be given the equities to which she was entitled if she be required to pay her proportionate part of the principal. The Virginia commission, as well as the bondholders, must have known of the existence of these equities, yet neither of these representatives, the bondholders in the one instance and the representatives of the state of Virginia upon the part of the other, were willing to concede to West Virginia that which she was justly entitled to receive, so that West Virginia had no other course than to appeal to the supreme court to be given equity, and the brief period of five months was allotted to review a record of ninety-three years.

This commission was composed of John W. Mason (its chairman), a distinguished jurist, of Fairmont; William D. Ord, a coal operator of the Pocahontas field and a man of wide business experience; J. A. Lenhart, a merchant and man of affairs, of Kingwood; R. J. A. Boreman, a business man of experience and character, of Parkersburg; Henry Zilliken, a former state senator, from the county of Brooke; Joseph S. Miller, a former auditor of the state and commissioner of internal revenue under President Cleveland; U. G. Young, a clear-headed lawyer of Buckhannon; W. T. Ice, Jr., a well known member of the legal profession; W. E. Wells, a prominent business man of the Upper Panhandle, well known for his private enterprise and public spirit; John M. Hamilton, a former congressman, and Major Joseph Chilton, of Charleston, a man well versed in the history and affairs of our state.

A detailed account of the negotiations of the commission will be found in its published report thereof, and any one desiring to familiarize himself with the entire history of the controversy will find an accurate and clear statement of the same therein. It was made a part of the record of the legislature of 1915. The present paper is but a brief outline of what occurred.

With respect to the success of the efforts made by the present administration to reduce the amount of this debt, it should likewise be borne in mind that had the case been left where it was found when I came into office the result would have been far more onerous to West Virginia than it now is. The supreme court had already decreed by its opinion of March, 1911, that West Virginia's share of the principal of the debt was $7,182,507.46. Applying the method that was used by the court in its decision of June 14, 1915, in charging interest on the original principal of the debt that was found on March 6, 1911, then the interest on the original principal, computed by the court at 4 per cent, from January 1, 1861, to July 1, 1891, would have been $8,762,659.10 instead of $5,143,069.18; on the reduced

principal of $4,215,622.28, and the interest from July 1, 1891, to July 1, 1915, at 3 per cent would have been $5,171,405.38 instead of $3,305,248.04, making an aggregate principal and interest on the original amount as found by the court in October, 1911, of $21,116,571.84, instead of $12,393,929.50. In other words, the state has been saved in principal and interest, $8,722,642.34. This resulted from the re-opening of the case and by the application of credits which reduced West Virginia's part of the principal from $7,182,507.46 to $4,215,622.28.

Neither should any attempt at even an outlined history of this controversy be made without mentioning the labors of the supreme court itself. The record was voluminous; much evidence had been lost by the lapse of time and the questions involved were difficult and delicate; but notwithstanding all these things the court has conducted the proceedings with uniform patience and fair consideration to both sides, with the exception of the short period of time that was given our state to present in the proper way substantial but accurate data of the credits to which West Virginia was entitled but which was indeed hard to support on account, as previously stated, of the long lapse of time that had intervened. With the short period at hand it was almost impossible to verify the absolute authenticity and justification of the credits that were asked for, and had more time been given, in all probability greater results would have been achieved. The court has been considerate. Even after once making its findings, it re-opened the case and heard additional testimony to the end that no equitable claim might be overlooked. There are other equities in such condition that West Virginia, on account of her embarrassing position, has been unable to present. These other equities, which it is my purpose to discuss, West Virginia has been unable to present because of her restricted position. Virginia found in the days when she was staggering under a financial obligation that it was necessary for her to refund her public debt in part, which

was done to the end that she might be able to liquidate her obligation; yet with all of these burdens, which came about largely from the result of the Civil war, she did not take upon herself the burden of assuming an interesting-bearing obligation at a rate of 5 per cent, and, if we are to interpret from her previous attitude, if she had been confronted with this appalling interest charge which the supreme court has suggested for West Virginia, by Virginia's expressed act of 1871 to 1892, she would refund and reduce it to an amount which she would consider just and equitable. It is true West Virginia does not enjoy the same free and unrestricted position as did the mother state when she refunded her public debt. Virginia has conspired with her creditors, which resulted in a reduction of her debt and the charging of one-third of her obligations to West Virginia, which the supreme court found was inequitable and placed it at 23 1-2 per cent instead of 33 1-3 per cent.

Virginia issued bonds to her creditors against West Virginia upon the basis of charging West Virginia with one-third of her public debt, which were accepted by the bondholders, and then obligated herself to permit her name to be used, if need be, to carry on whatever litigation was necessary to compel West Virginia to pay this amount at the expense of the bondholders, including the interest upon these bonds. This was done, notwithstanding Virginia had always had control, possession and use of these assets which she developed out of the money that was borrowed and which she is asking West Virginia to help pay, and that she in some instances sold these properties, from which was realized millions of dollars, as well as dividends and interest.

Some of these assets which were developed and for which West Virginia is asked to help pay, are still retained by the state of Virginia. Some of them are quoted in the market as being worth many times their original cost. Virginia has had the continuous benefit of the money derived out of their sales

and out of the dividends and interest that has been paid by the property that she still holds, and the use of other properties that she still retains and from which she is drawing substantial returns. None of these properties has ever benefited West Virginia whatever, yet she must pay at a rate of three per cent upon the principal part of the obligation, which these properties represent, as decreed by the supreme court; at a rate of four per cent for another period, and with the high water mark fixed at five per cent, in the way of interest upon the decreed principal to West Virginia, until the entire amount is liquidated, notwithstanding that these certificates representing West Virginia's share of the Virginia debt were bartered and traded in by speculators at five and ten cents on the dollar.

Taking into consideration all these historical facts representing the stages through which the debt matter has passed, as a layman, I indeed can see no equity or right in the saddling of this great burden of interest, approximating a total double the amount of the decreed principal that has been asked of West Virginia to assume, upon the taxpayers of West Virginia.

After many of the matters and things heretofore appearing had been reported by the debt commission to the legislature, but before the supreme court had rendered the judgment of June 20, 1915, the legislature by an act passed February 20, 1915, and effective from passage, abolished the debt commission hereinbefore referred to and created another, known as the new Virginia debt commission, with less members and increased power. By this act the governor was made ex-officio a member, and the chairman of the commission and the remaining four commissioners to be appointed by him and confirmed by the senate, and this was at once done and the present or new Virginia debt commission as now constituted is composed of the governor as ex-officio chairman, Honorable W. E. Wells, of Newell; Honorable William T. Ice, Jr., of Philippi; Honorable Joseph S. Miller, of Kenova and Honorable J. W. Dawson, of

Charleston, the latter having succeeded the Honorable John W. Mason, who resigned to accept an appointment upon the supreme court of the state of West Virginia.

After the creation and appointment of the new commission and after the rendition by the supreme court of the United States of the final judgment of June 20, 1915, the state of Virginia gave notice to the state of West Virginia that it would, on the fifth day of June, 1916, move the supreme court for a writ of execution upon the judgment aforesaid, directing the marshal of said court to levy upon the property of the state of West Virginia subject to levy, in satisfaction of said judgment, and upon the day named said state presented its petition to the supreme court for and moved the issuance of such execution. The state of West Virginia, by counsel, likewise appeared upon said date and filed her answer to said petition, through the Honorable John H. Holt, and in resistance to said motion presented a brief in support of the answer so filed. The ground set up in the answer by way of resistance to the motion was as follows:

"1. Because the state of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen.

"2. Because not only presumptively, but in fact, the state of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and

does not now own, any property, real or personal, except such property as was and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution.

"3. Because section 2 of article III of the Federal Constitution, conferring jurisdiction upon this court to determine 'controversies between two or more states,' simply referred to the judiciary the settlement of the questions of law and fact involved in such controversies, and the determination, in the form of a judgment, of the rights of the sovereign parties, with the implication that the defeated commonwealth would, in good faith, accept and abide by the judgment so rendered, and voluntarily provide for its satisfaction, and does not make such judgments compulsory, but only persuasive, where they are for money without collateral security, because not enforceable by execution against public property, or by mandamus infringing the taxing power of the states reserved by the Constitution."

On the twelfth day of June, 1916, the supreme court denied the motion of Virginia, and refused to issue the writ, upon the ground that the application therefor was premature. Mr. Chief Justice White delivered the opinion of the court, and, after stating the grounds of the motion, as well as the defenses set forth in the answer, stated the conclusion of the court in the following language:

> "Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.
>
> "The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the legislature of the state of West Virginia has met and had reasonable opportunity to provide for the payment of the judgment."

Commonwealth of Virginia v. State of West Va., 241 U. S. 531. (60 L. Ed 1147).

The next step, therefore, in the Debt controversy must be taken by the Legislature of the State of West Virginia, and such step should be taken at its present session. Fortunately, two members of the present Legislature are familiar with all of the details of this controversy; one, the Hon. Septimius Hall, of Wetzel county, having served in the Constitutional Convention of 1872, and who remembers well the discussion that took place relative to the provisions of section 8 of Article 8 of the Constitution of 1862, and also section 4 of Article 10 of the Constitution of 1872, and who had served almost continuously —either in the Senate or the House—in the West Virginia Legislature since that time. He is quite familiar with the progress in the way of law-making and state development since the foundation of West Virginia, and has rendered valuable service to me as Governor on account of the great amount of knowledge possessed by him as to this controversy. I would indeed be recreant to my duty if I did not express my sincere appreciation of the great service he performed in assisting in the efforts to secure substantial equities to which West Virginia was justly entitled, but on account of the great lapse of time proved to be indeed a most arduous task. The other member of the present Legislature is the Honorable Robert L. Gregory, who abstracted all the Acts and Resolutions passed by the General Assembly of Virginia bearing upon the Virginia Debt subject, from 1822 to the present, and he now has in his possession a copy of his work which no doubt will be of great service in giving information to those who have not an intimate knowledge of this controversy. I, therefore, am deeply indebted to Senator Gregory for his valuable service in this controversy during my term as Governor, and no doubt he will be of great service to the upper branch of the Legislature on account of his knowledge of the litigation of this case during the last four years.

The narrow limits that have been imposed leave but few alternatives. To decline to pay the debt means repudiation—

and this course I do not believe West Virginians are willing to adopt. I feel justified in saying that our citizenry will be willing to assume any equitable or reasonable amount that their ability to pay will permit for the sake of the Constitution under which we live, for the sake of the Union of which we are a part, and for the high regard in which they hold the highest tribunal of the land, regardless of the unfairness of the embarrassing position which it has always been our State's misfortune to occupy in the public debt controversy. The mere suggestion that West Virginia would eventually be forced to adopt some extreme measure to protect herself against injustice is a reflection on Virginia. We must conclude that in the end the amount West Virginia should pay will be correctly ascertained, and when so ascertained we can only declare our oft-repeated willingness to pay. What West Virginians protest against is paying what we do not owe. Virginia has unliquidated assets in which West Virginia has an equitable part; but again on account of West Virginia's position she has been unable to prosecute these claims and have them considered in the adjustment of the financial differences that now exist between West Virginia and Virginia. Notwithstanding Virginia's former governors have discussed in their messages to the legislature these assets, up to the present time Virginia authorities have failed to act.

I am confident West Virginians are willing to pay when Virginia and her bondholders concede to West Virginia the proper credits to which she is entitled, which include the liquidation of all the joint assets and their proper apportionment in the way of credits. Any residue or balance that West Virginia owes thereafter she is willing to assume.

Had we received a statement of the account as requested and asked for by the commission raised by West Virginia, known as the Bennett Commission of 1871, there is no question but what this long-drawn-out litigation that has cost the State enormous

sums of money would have been at an end many years ago. The long period of time that has elapsed has made it almost impossible to have an accurate statement of the account rendered showing the small liability that West Virginia would be required to assume, if complete information had been obtainable relating to the interest to which we were entitled in the assets.

Making immediate provision for the payment of this debt as indicated by the Court's last opinion without discount or further controversy by West Virginia involves a serious question of ways and means.

It is well known that there are no present funds out of which such a payment could be made, and a direct levy for that purpose would be enerous, if permissible, which is not the case. Therefore, we turn at once to a bond issue, the only method left, and the question has been raised as to whether such bonds could be issued under our Constitution, and whether or not the present Legislature would have the right and power to act under the authority of the old Constitution, or whether any acts upon its part regarding the issuing of bonds would be permissible under the Constitution of 1872, and, if so, whether that clause of section 4 of Article 10 of the Constitution gives the Legislature the power to authorize the issuance of such bonds in the absence of a vote of the people. This, I believe, is not a question for me to decide, but for the Legislature itself. But it is unnecessary to discuss ways and means until we know how much we are to pay.

This Legislature will have all the information that is available upon the subject of the Virginia Debt, and it must meet the responsibility of determining what the future course of the State should be in this important matter. The members of the Legislature come fresh from the people and know the sentiment of the people upon this question. It is their duty to leave with the Virginia Debt Commission and the Legal Department of

the State specific instructions as to the steps they desire to have taken to protect the interest of West Virginia.

There are substantial equities in favor of West Virginia which have not been heretofore presented to the Supreme Court, and could not have been reasonably presented any sooner under the circumstances with which West Virginia has, from a legal standpoint, been confronted. This situation has been given consideration by Senator William E. Chilton. (The correspondence between the Senator and myself, in part, I submit, together with the reports of the Judiciary Committee of the United States Senate and the discussions of the bill which Senator Chilton has presented before the Senate of the United States.) While this course would necessarily, for the time being, postpone the consideration of payment of any part of the judgment, or the arrangement for the same in whole or in part, yet, if taken in good faith (and no equity should be presented of such a character as would not carry the stamp of good faith upon its face) it would involve neither repudiation nor any threat thereof, but would simply be an effort to reduce a burden which negotiations so far have been unable to touch, and courtesy and consideration in the way of information at the hands of representatives of the mother state have been closed to West Virginia, leaving its representatives to their own ingenuity and energies to work out and present the best effort that they could with the small light they have had to guide them in search for equities in settling up the joint obligations of the two states. This assertion is substantiated by the forceful resistance and denial of any equities to which West Virginia was entitled when she asked the Virginia Commission to grant her share in such equities and that the representatives of West Virginia would recommend to the Legislature of West Virginia the assumption of the residue after these equities had been applied. Not only did the Virginia Commission refuse to discuss these equities, but resisted and denied their existence before the

Supreme Court of the United States; and upon an investigation, hurried though it was, during a short period of five months, West Virginia was able to prove to the satisfaction of the Supreme Court of the United States that such equities did exist in the amount of $14,511,945.74.

I feel that West Virginia's record is such that after the proper preparation had been made and presented to the Supreme Court, it would have respectful consideration, notwithstanding the Court's last decision. In the consideration of such an equity, my attention has been called to the claim of Virginia against the Government of the United States growing out of the cession of the Northwest Territory, and in the fruits of which, if Virginia should realize anything therefrom, West Virginia should be permitted to participate, either by way of liquidating or reducing the claim of Virginia against her, which equity Virginia unquestionably has and which is doubted by no one who fully knows of this historical proceeding, in which Virginia has a seventh part in a claim against the Government of the United States amounting to many millions of dollars. A brief history, I herewith recite:

Prior to the adoption of the articles of confederation entered into by the thirteen original states, Maryland refused to sign the same, unless and until those states holding western territory should surrender the same to the United States. The State of Virginia at the time laid claim to all that territory lying northwest of the Ohio River out of which the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota have since been formed; and, by an act of her General Assembly passed at a session commencing on the 20th day of October, 1783, and for the purpose of expediting the establishment of the proposed confederation, authorized her delegates in Congress to convey to the United States in Congress assembled all her territory northwestward of the Ohio River, and, on the 1st day of March, 1784, her delegates in Congress, consisting of Thomas

Jefferson, Samuel Hardy, Arthur Lee and James Monroe, and pursuant to the Act of October 20, 1783, presented a deed to Congress ceding all the territory of Virginia northwestward of the Ohio River to the United States, upon certain terms, conditions and trusts therein set forth, which deed of cession was accepted according to its terms, and directed to be recorded and enrolled among the acts of the United States in Congress assembled. Among the conditions set out in the deed and accepted by Congress was the following.

> "(F) That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It further appears from the requisition made by Congress upon the thirteen States at the time of this cession that Virginia's "usual respective proportion in the general charge and expenditures" was about one-seventh of the whole; and it seems to be also conceded that the moneys derived from a sale of the lands embraced in this cession were to be applied to the extinguishment of the public debt incurred in the war of the Revolution, which debt was finally paid; so that, after this part of the trust had been met, and certain other conditions of the deed not necessary to mention had been performed, the residue of the trust fund should have been applied to the reserved interests of the States set forth in Article (F) of the deed, Virginia included, and to "No other use or purpose whatsoever." Instead of doing this, however, Congress seems to have donated

many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms.

Since 1912, Senator Chilton, of this State, has been pressing upon the attention of the Congress of the United States a bill to authorize West Virginia to sue in the Supreme Court of the United States for West Virginia's part of the Northwest Territory trust. He has kept me informed from time to time of his progress, and, as I understand it, a bill has finally been reported from the Committee on the Judiciary of the United States Senate allowing any state to sue the United States upon any claim which, as between individuals, would be cognizable in a court of justice. If this bill should pass, West Virginia would have the right to bring a suit against the Federal Government and present this claim and secure a decision one way or the other. I deem this subject of sufficient importance to present to the Legislature a brief history of this claim. The matter can be best understood by a report made by a sub-committee of the United States Senate, consisting of Senators Walsh, Nelson and Chilton, which I hereby make part of this message.

"(COMMITTEE PRINT)

REPORT OF SUB-COMMITTEE TO COMMITTEE ON THE JUDICIARY ON SENATE BILL 4054.

This bill was referred to a sub-committee composed of Senators Bacon, Nelson and Chilton. Senator Bacon having died, Senator Walsh was substituted in his place.

The subject matter of this report arises out of Senate Bill 578 introduced in the Senate on April 9, 1913, and Senate Bill 5054, introduced on January 17, 1914. (The data upon which this report is made is found in an address delivered by Senator Chilton in the Senate of the United States on April 10, 1912).

On the 21st of May, 1779, the Delegates from Maryland laid

before Congress the following instructions received by them: Instructions of the General Assembly of Maryland to George Plater, William Paca, William Carmichael, John Henry, James Forbes, and Daniel St. Thomas Jenifer, Esqs.

GENTLEMEN: Having conferred upon you a trust of the highest nature, it is evident we place great confidence in your integrity, abilities, and zeal to promote the general welfare of the United States, and the particular interest of this State where the latter is not incompatible with the former; but to add greater weight to your proceedings in Congress and take away all suspicion that the opinions you there deliver, and the votes you give, may be the mere opinions of individuals and not resulting from your knowledge of the sense and deliberate judgment of the State you represent, we think it our duty to instruct as followeth on the subject of the Confederation—a subject in which, unfortunately, a supposed difference of interest has produced an almost equal division of sentiments among the several States composing the Union. We say a supposed difference of interest; for if local attachments and prejudices and the avarice and ambition of individuals would give way to the dictates of a sound policy, founded on the principles of justice—and no other policy but what is founded on those immutable principles deserves to be called sound—we flatter ourselves this apparent diversity of interests will soon vanish, and all the States would confederate on terms mutually advantageous to all, for they would then perceive that no other confederation than one so formed can be lasting. Although the pressure of immediate calamities, the dread of their continuance from the appearance of disunion, and some other peculiar circumstances may have induced some States to accede to the present Confederation, contrary to their own interests and judgments, it requires no great share of foresight to predict that when those causes cease to operate the States which have thus acceded to the Confederation will consider it as no longer binding and will eagerly embrace

the first occasion of asserting their just rights and securing their independence. Is it possible that those States who are ambitiously grasping at territories to which, in our judgment, they have not the least shadow of exclusive right, will use with greater moderation the increase of wealth and power derived from these territories, when acquired, than what they have displayed in their endeavors to acquire them? We think not. We are convinced the same spirit which hath prompted them to insist on a claim so extravagant, so repugnant to every principle of justice, so incompatible with the general welfare of all the States, will urge them on to add oppression to injustice. If they should not be incited by a superiority of wealth and strength to oppress by open force their less wealthy and less powerful neighbors, yet depopulation, and consequently the impoverishment of those States, will necessarily follow, which, by an unfair construction of the Confederation, may be stripped of a common interest and the common benefit derivable from the western countries. Suppose, for instance, Virginia indisputably possessed of the extensive and fertile country of which she has set up claim. What would be the probable consequences to Maryland of such an undisturbed and undisputed possession? They cannot escape the least discerning.

Virginia, by selling on the most moderate terms a small proportion of the lands in question, would draw into her treasury vast sums of money, and, in proportion to the same arising from such sales, would be enabled to lessen her taxes. Lands comparatively cheap and taxes comparatively low with the lands and taxes of an adjacent State would quickly drain the State thus disadvantageously circumstanced of its most useful inhabitants. Its wealth and its consequence in the scale of the confederated States would sink, of course. A claim so injurious to more than one-half if not the whole of the United States ought to be supported by the clearest evidence of the right. Yet what evidences of that right have been produced? What argu-

ments alleged in support either of the evidence or the right? None that we have heard of deserving a serious refutation.

It has been said that some of the delegates of a neighboring State have declared their opinions of the impracticability of governing the extensive domain claimed by that State. Hence also the necessity was admitted of dividing its territory and erecting a new State under the auspices and direction of the elder, from whom, no doubt, it would receive its form of government, to whom it would be bound by some alliance or confederacy, and by whose councils it would be influenced. Such a measure, if ever attempted, would certainly be opposed by the other States as inconsistent with the letter and spirit of the proposed Confederation. Should it take place by establishing a subconfederacy, *imperium in imperio*, the State possessed of this extensive dominion must then either submit to all the inconveniences of an overgrown and unwieldy government or suffer the authority of Congress to interpose at a future time and to lop off a part of its territory, to be erected into a new and free State and admitted into a confederation on such conditions as shall be settled by nine States. If it is necessary for the happiness and tranquillity of a State thus overgrown that Congress should hereafter interfere and divide its territory, why is the claim to that territory now made and so pertinaciously insisted on? We can suggest to ourselves but two motives—either the declaration of relinquishing at some future period a proportion of the country now contended for was made to lull suspicion asleep and to cover the designs of a secret ambition, or, if the thought was seriously entertained, the lands are now claimed to reap an immediate profit from the sale. We are convinced policy and justice require that a country unsettled at the commencement of this war, claimed by the British Crown, and ceded to it by the treaty of Paris, if wrested from the common enemy by the blood and the treasure of the 13 States, should be considered as a common property, subject to be parceled out by

Congress into free, convenient, and independent governments in such manner and at such times as the wisdom of that assembly shall hereafter direct.

Thus convinced we should betray the trust reposed in us by our constituents were we to authorize you to ratify on their behalf the confederation, unless it be further explained. We have coolly and dispassionately considered the subject; we have weighed probable inconveniences and hardships against the sacrifice of just and essential rights; and do instruct you not to agree to the confederation unless an article or articles be added thereto in conformity with our declaration. Should we succeed in obtaining such article or articles, then you are hereby fully empowered to accede to the confederation.

That these, our sentiments respecting our confederation, may be more publicly known and more explicitly and concisely declared, we have drawn up the annexed declaration, which we instruct you to lay before congress, to have printed, and to deliver to each of the delegates of the other states in congress assembled copies thereof signed by yourselves or by such of you as may be present at the time of delivery, to the intent and purpose that the copies aforesaid may be communicated to our brethren of the United States and the contents of said declaration taken into their serious and candid consideration.

Also we desire and instruct you to move at the proper time that these instructions be read to congress by their secretary and entered on the journals of congress.

We have spoken with freedom as becomes free men, and we sincerely wish that these, our representations, may make such an impression on that assembly as to induce them to make such additions to the articles of confederation as may bring about a permanent union.

A true copy from the proceedings of December 15, 1778.

Teste: T. Duckett,
Clerk of the House of Delegates.

These instructions were referred to a committee. Later, on September 6, 1780, the congress took into consideration the report of this committee, when the following proceedings took place:

IN CONGRESS OF THE CONFEDERATION,

Wednesday, September 6, 1780.

Congress took into consideration the report of the committee to whom were referred the instructions of the general assembly of Maryland to their delegates in congress respecting the articles of confederation and the declaration therein referred to, the act of the legislature of New York on the same subject, and the remonstrance of the general assembly of Virginia, which report was agreed to and is in the words following:

"That, having duly considered the several matters to them submitted, they consider it unnecessary to examine into the merits or policy of the instructions or declarations of the general assembly of Maryland or of the remonstrance of the general assembly of Virginia, as they involve questions, a discussion of which was declined on mature consideration, when the articles of confederation were debated; nor, in the opinion of the committee, can such questions be now revived with any prospect of conciliation; that it appears more advisable to press upon those states which can remove the embarrassment respecting the western country a liberal surrender of a portion of their territorial claims, since they cannot be preserved entire without endangering the stability of the general confederacy; to remind them how indispensably necessary it is to establish the federal union on a fixed and permanent basis and on principles acceptable to all its members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils and success of our measures, to our tranquillity at home, our reputation abroad, to our very existence as a free, sovereign, and independent people; that they are fully per-

suaded the wisdom of the respective legislatures will lead them to a full and impartial consideration of a subject so interesting to the United States and so necessary to the happy establishment of the federal union; that they are confirmed in these expectations by a review of the before-mentioned act of the legislature of New York, submitted to their consideration; that this act is expressly calculated to accelerate the federal alliance, by removing as far as depends on that state, the impediment arising from the western country, and for that purpose to yield up a portion of territorial claim for the general benefit: Whereupon

Resolved, That copies of the several papers referred to the committee be transmitted, with a copy of the report, to the legislatures of the several states, and that it be earnestly recommended to those states who have claims to the western country to pass such laws and give their delegates in congress such powers as may effectually remove the only obstacle to a final ratification of the articles of confederation; and that the legislature of Maryland be earnestly requested to authorize the delegates in congress to subscribe the said article.

Later, on October 10, 1780, the congress passed the following resolution:

Tuesday, October 10, 1780.

Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular state pursuant to the recommendation of congress of the sixth day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the union and have the same rights of sovereignty, freedom and independence as the other states; that each state which shall be so formed shall contain a suitable extent of territory, not less than 100 nor more than 150 miles square, or as near thereto as circumstances will admit; that the necessity and reasonable expenses which

any particular state shall have incurred since the commencement of the present war in subduing any British posts, or in maintaining forts or garrisons within and for the defense, or in acquiring any part of the territory that may be ceded or relinquished to the United States shall be reimbursed.

That the said lands shall be granted or settled at such times and under such regulations as shall hereafter be agreed on by the United States in congress assembled, or any nine or more of them.

At this point it is well to consider the articles of confederation, the powers of the continental congress, and the relations of each one of the states thereto. The articles of confederation left to the states complete control of the western lands belonging to each state. The congress did have the power given it in article IX for the settlement of boundaries in dispute between the states, but beyond that there was no power in the congress concerning the states or their land holdings.

In January, 1781, the legislature of Virginia passed a resolution which suggested a plan under which that state could convey to the then federal alliance the northwest domain then held by the state of Virginia. Let it be borne in mind that this northwest territory was held by the state of Virginia in fact under its original grant from King James, and that the state of Virginia claimed that its boundaries went to the lakes and to the Mississippi river, and before the time of which we are about to speak that state had at its own expense fought the battle of Point Pleasant at the mouth of the Kanawha river, and had sent George Rogers Clark on his famous expedition to Vincennes and had conquered the territory in question. In other words, it had located on the ground the boundary claims and had seized it as a sovereign and had taken *pedis possessionis* of the territory claimed, so that when the resolutions of 1781 were passed the state of Virginia was dealing with a territory which is not only claimed under a grant but its

title and possession had been sealed by its own treasure and its own sacrifice of blood.

At the time in question, to-wit, when the state of Virginia made this proposition to the federal alliance, the state of Maryland had not entered into the federal alliance. The other twelve of the thirteen original states had done so, but for the reasons set forth in the instructions to its delegates to the continental congress Maryland had declined to become a party to the alliance by formal action. True, it had sent delegates to the continental congress and had paid its proportion of the public expenditures, but it had declined to enter formally into the alliance; and the action of the continental congress, its representations made to the state of Virginia and the action of the state of Virginia were all part of a plan to induce the state of Maryland to enter into the federal alliance. To show that this is true, it is only necessary to read the proceedings, hereinbefore referred to, of September 6, 1780, and October 10, 1780, and then to note the fact that in about two months after Virginia had passed the resolution of January, 1781, setting forth the terms upon which she would make the grant to the federal alliance, to-wit, in March, 1781, Maryland ratified the federal compact and became a part of the federal alliance, and thus completed the first organized government of the original thirteen states.

On the twentieth of October, 1783 (there was no need to hurry in those days), Virginia, through her legislature, authorized the continental congress to make the conveyance.

On March 1, 1784, Virginia, through her delegates to the continental congress, to-wit: Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, tendered the deed of cession to the continental congress. The deed contained the same clauses, reservations and trusts that were mentioned in the act of January, 1781, of the legislature of Virginia.

On March 1, 1784, the matter came before the continental congress upon the presentation of the deed of cession aforesaid, and thereupon the following proceedings took place:

March 1, 1784, Virginia, through her delegates in the continental congress, Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, completed the act of cession, the following proceedings being had in congress:

On motion of Mr. Howell of Rhode Island, the following resolution was adopted:

Whereas the general assembly of Virginia, at their session commencing on the 20th day of October, 1783, passed an act to authorize their delegates in congress to convey to the United States in congress assembled, all the right of that commonwealth to the territory northwest of the River Ohio; and

Whereas the delegates of the said commonwealth have presented to congress the form of a deed proposed to be executed pursuant to the said act, in the words following:

"To all who shall see these presents, we, Thomas Jefferson Samuel Hardy, Arthur Lee, and James Monroe, the underwritten delegates for the commonwealth of Virginia, in the congress of the United States, send greetings:

"Whereas the general assembly of the commonwealth of Virginia, at their sessions begun on the 20th day of October, 1783, passed an act entitled 'An act to authorize the delegates of this state in congress to convey to the United States, in congress assembled, all the right of this commonwealth to the territory northwestward of the River Ohio, in these words following, to-wit:

" 'Whereas the congress of the United States did, by their act of the 6th day of September, in the year 1780, recommend to the several states in the union having claims to waste and un-

appropriated lands in the western country a liberal cession to the United States of a portion of their respective claims for the common benefit of the union; and

"'Whereas this commonwealth did, on the 2nd day of January, in the year 1781, yield to the congress of the United States for the benefit of said states, all right, title, and claim which the said commonwealth had to the territory northwest of the River Ohio, subject to the conditions annexed to the said act of cession.

"'And whereas the United States in congress assembled have, by their act of the 13th of September last, stipulated the terms on which they agree to accept the cession of this state, should the legislature approve thereof, which terms, although they do not come fully up to the propositions of this commonwealth, are conceived, on the whole, to approach so nearly to them as to induce this state to accept thereof, in full confidence, that congress will, in justice to this state for the liberal cession she has made, earnestly press upon the other states claiming large tracts of waste and uncultivated territory the propriety of making cessions equally liberal for the common benefit and support of the union:

"'*Be it enacted by the General Assembly*, That it shall and may be lawful for the delegates of this State to the Congress of the United States or such of them as shall be assembled in Congress, and the said delegates or each of them so assembled are hereby fully authorized and empowered, for and on behalf of this State, by proper deeds or instruments in writing, under their hands and seals, to convey, transfer, assign, and make over into the United States in Congress Assembled, for the benefit of said States, all right, title, and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the River Ohio, subject to the terms and conditions contained in the before-recited

act of Congress of the 13th day of September last; that is to say, upon condition that the territory so ceded shall be laid out and formed into States, containing a suitable extent of territory, not less than 100 nor more than 150 miles square, or as near thereto as circumstances will admit; and that the States so formed shall be distinct republican States and admitted members of the Federal Union, having the same right of sovereignty, freedom, and independence as the other States.

"'That the necessary and reasonable expenses incurred by this State in subduing any British posts or in maintaining forts and garrisons within and for the defense, or in acquiring any part of, the territory so ceded or relinquished shall be fully reimbursed; and that one commissioner shall be appointed by Congress, one by this Commonwealth, and another by those two commissioners, who, or a majority of them, shall be authorized and empowered to adjust and liquidate the account of the necessary and reasonable expenses incurred by this State which they shall judge to be comprised within the intent and meaning of the act of Congress of the 10th of October, 1780, respecting such expenses. That the French and Canadian inhabitants and other settlers of the Kaskaskies, St. Vincents, and the neighboring villages who have professed themselves citizens of Virginia shall have their possessions and titles confirmed to them and be protected in the enjoyment of their rights and liberties. That a quantity not exceeding 150,000 acres of land promised by this State, shall be allowed and granted to the then Colonel, now Gen. George Rogers Clark, and to the officers and soldiers of his regiment who marched with him when the posts of Kaskaskies and St. Vincent were reduced, and to the officers and soldiers that have been since incorporated into the said regiment, to be laid off in one tract, the length of which not to exceed double the breadth, in such place on the northwest side of the Ohio, as a majority of the officers shall choose, and to be afterwards divided among the said officers and soldiers in due

proportion according to the laws of Virginia. That in case the quantity of good land on the southeast side of the Ohio, upon the waters of Cumberland River and between the Green River and Tennessee River, which have been reserved by law for the Virginia troops, upon continental establishment, should, from the North Carolina line bearing in farther upon the Cumberland land than was expected, prove insufficient for their legal bounties, the deficiencies should be made up to the said troops in good lands, to be laid off between the rivers Scioto and Little Miami, on the northwest side of the River Ohio, in such proportion as have been engaged to them by the laws of Virginia. That all the lands within the territory so ceded to the United States and not reserved for or appropriated to any of the beforementioned purposes or disposed of in bounties to the officers and soldiers of the American Army shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose and for no other use or purpose whatsoever: *Provided*, That the trust hereby reposed in the delegates of this State shall not be executed unless three of them, at least, are present in Congress.

"'And whereas the said general assembly, by the resolution of June 6, 1783, had constituted and appointed us, the said Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, delegates to represent the said Commonwealth in Congress for one year, from the first Monday in November then next following, which resolution remains in full force:

"'Now, therefore, know ye that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, by virtue of the power and authority committed to us by the Act of the said General Assembly of Virginia before recited, and in the

name and for and on behalf of the said Commonwealth, do by these presents convey, transfer, assign, and make over unto the United States, in Congress assembled, for the benefit of the said States, Virginia inclusive, all right, title, and claim, as well of soil as jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia charter situate, lying, and being to the northwest of the River Ohio, to and for the uses and purposes and on the conditions of the said recited act. In testimony thereof we have hereunto subscribed our names and affixed our seals in Congress the 1st day of March, in the year of our Lord, 1784, and of the independence of the United States the eighth.' "

Resolved, That the United States in Congress assembled are ready to receive this deed whenever the delegates of the State of Virginia are ready to execute the same.

The delegates of Virginia then proceeded and signed, sealed, and delivered the said deed, whereupon Congress came to the following resolution:

Resolved, That the same be recorded and enrolled among the acts of the United States in Congress assembled.

The claim of the thirteen original States, including the States of Virginia and West Virginia (which were, prior to June 1863, the State of Virginia), arises out of the following clause in the deed of cession and in the act of January 1781:

That all land within the territory so ceded to the United States and not reserved or appropriated to any of the beforementioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation, or Federal Alliance, of the said States, Virginia inclu-

sive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose and for no other use or purpose whatsoever.

In the case of the State of Virginia *vs.* the State of West Virginia, recently decided by the Supreme Court of the United States (220 U. S. 1), it was held that the obligations of the State of Virginia prior to the separation must be in part assumed by the State of West Virginia, and it necessarily follows that the assets and property which originally belonged to the State of Virginia must be divided or proportioned among the two States upon the same basis that the obligations are to be paid. The contention is, therefore, that if Virginia had a claim against the Government of the United States arising out of the deed of cession hereinbefore referred to, a proportionate part of the said claim would, since the separation in 1863, belong to the State of West Virginia, and that the trust subject reserved in the deed of cession of 1784 now belongs to fourteen States.

The trust created by the deed of cession of 1784 is specific in every particular. It, in effect, made the original Federal Government a trustee to whom was conveyed the legal title to the Northwest Territory, and the same should be held for the use and benefit of the thirteen original States, "Virginia inclusive." By inserting the words "Virginia inclusive" there is shown an intention on the part of Virginia to avoid any possible construction that she being the grantor should not participate with her twelve sister States in the proceeds of the land which her foresight had acquired and her valor had conquered. She left no room to construe the grant more strongly against the grantor and expressed in precise language a purpose and intention to keep this territory as a trust for the benefit of the original thirteen States. She fixed by the act of her Legislative Assembly, and followed it in the conveyance,

a rule by which the interest of each State should be determined, to-wit, "according to their usual respective proportions in the general charge and expenditure."

It is a well known rule of equity that "that is certain which can be made certain."

To determine what this language means we must go back to the original Articles of Confederation and put ourselves in the position now, in which the original thirteen States were, at the time this deed of cession was made, and in the position in which the members of the Continental Congress were when it was accepted.

By turning to Article VIII of the Articles of Confederation we find that the expenses of the Federal Alliance were to be paid out of a common fund to be contributed by each State, or, in the language of the Articles of Confederation, "Supplied in proportion to the value of the land in each State."

It is a matter of history and of record that the land in each State was valued and that this valuation in each State was added together and made the common denominator by which the whole cost was divided. Then this result was multiplied by the value of the land in each State to ascertain the amount which each State was expected to pay into the common fund for the common defense. To illustrate: If Virginia paid 4000, Delaware 1000, Pennsylvania 4000, New Jersey 2000, Georgia 2000, Connecticut 1000, Massachusetts 4000, Maryland 2000, South Carolina 1000, New Hampshire 1000, New York 4000, North Carolina 3000, Rhode Island 1000, all of them would have paid 30,000; then the proportions would be for Virginia 4/30, Delaware 1/30, Pennsylvania 4/30, New Jersey 2/30, Georgia 2/30, etc. There would be no trouble for any jury, master, commissioner, or court to determine the rights of any party in the trust thus created.

The cause in question refers to the practice under Article VIII of the Articles of Confederation. It refers to the prac-

tice of the Continental Congress and of each State in construing and executing that article of their fundamental law. What was paid in by each State is a matter of record. The value of the lands in each State is a matter of record. Neither the States nor the Continental Congress had any trouble in fixing the proportionate part of the general expenses which each State should bear. There should be no trouble now in ascertaining in the same way the part of the trust subject to which each State would be entitled.

The States of Virginia and West Virginia now claim that the present National Government when it was formed in 1789 took possession of this Northwest Torritory and has ever since treated it as the property of the United States, and has dealt with it as if the conveyance had been without condition or reservation.

These States claim that the present Federal Government has sold the land and has used the proceeds for the general expenses of the Government; that it has given away the land to States and to colleges, and has not kept the trust subject for the use and benefit of the thirteen original States as was provided in the original deed of cession.

It is claimed in defense of this course that the Federal Government which was in existence in 1784 was merged into the present United States under the present Constitution and that the purpose of the original grant was to admit other States into the Union and that each State which should be so admitted would be entitled to participate under the clause "or shall become members of the Confederation, or Federal Alliance," etc.

The thirteen original States, or at least the State of Virginia and West Virginia, claim that this is not possible for the following reasons:

That it could not have been in contemplation of the Continental Congress that the present Constitution would be adopted by all of the thirteen original States. In fact, there is nothing

to show that the present Constitution was in contemplation as early as 1784. It may be conceded that some constitution and some more permanent government than the original Federal Alliance was then in contemplation, but that the present Constitution would be ratified by all of the thirteen original States could not have been in contemplation of the State of Virginia or of the Continental Congress as early as 1784. This position is urged upon the following grounds:

The present Constitution provides that it shall be operative when nine States shall have ratified it. The States of West Virginia and Virginia contend that it was probably within contemplation certainly a possibility that only nine States would ratify the present Constitution, and they assert that in the event that all of the original thirteen States, except four, Virginia being one of he four, had ratified the Constitution, then it could not possibly have been in contemplation of the parties that the nine who ratified the Constitution could take the Northwest Territory and leave out Virginia and her three sister States which failed to ratify. The use of the words in the grant "Virginia inclusive" would seem to add great force to this argument. In other words, suppose that Pennsylvania, New York, Massachusetts, and Virginia had failed to ratify the present Constitution; then Virginia and West Virginia assert that it would have been contrary to every principle of justice and to the clear intention of the deed of cession of 1784 for the nine States which ratified the Constitution to appropriate the trust subject and hold it as against the four States which had contributed so much to the revolutionary struggle, and especially would it have seemed contrary to every principle of justice to have disposed thus of the trust subject leaving out of consideration the original benefactor, the State of Virginia.

These are questions which your committee did not feel called upon to settle. The construction of the grant of 1784, and especially the rights of the thirteen original States under that

grant, your committee does not feel called upon to settle. It is sufficient to state that there is a controversy, and that the States of Virginia and West Virginia claim with great earnestness that there should be some tribunal which should settle the matter, or else it should be taken up by Congress and dealt with in a manner that will preserve the dignity and honor of the United States and do complete justice to the complaining States.

Under article VI of the constitution, "all debts contracted and engagements entered into, before the adoption of this constitution" were assumed by the United States. If, therefore, the contention of Virginia and West Virginia be tenable, and the first federal alliance was a trustee for the benefit of the thirteen original states, then by the adoption of the constitution of the United States government became the trustee and bound itself to deal with the trust subject to the same as the old confederation was bound to do at the time the grant was made.

Indeed, it is urged that by using the word "engagements" it was intended to preserve this particular trusteeship. And section 3 of article IV of the constitution in relation to the "territory" of the United States is also cited as showing an intention on the part of the framers of the constitution to protect each of the thirteen original states in the trust. That section is as follows:

"The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

It is contended that it is most significant that in the clause which empowers congress to dispose of the public domain the framers of the constitution took pains to see that such a grant of power should not be construed so as to "prejudice" any claims of any state.

It is strongly urged that the use of this language in dealing with the public domain evinced a purpose to preserve the trust created by the deed of cession because nothing else could have been in mind.

The territory in question embraces the states of Ohio, Indiana, Illinois, Wisconsin, and a large part of Michigan. The state of Virginia in 1910 by a resolution called upon her representatives in congress to take steps to protect the rights of Virginia in the premises; and the state of West Virginia in 1913 through her legislature memorialized congress to protect the rights of that state in the trust subject. A bill giving the consent of the United States to be sued was introduced by Senator Chilton in 1912, which was referred to the committee but was never acted upon.

The real object of the present bill S. 4054 is to permit a suit to be brought by any of the thirteen original states in the supreme court of the United States to test the contention of Virginia and West Virginia that only the thirteen original states have the right to participate in the proceeds of this northwest territory.

Of course, it is well settled that the national government can only to be sued by its consent and it can attach such conditions to that consent as it may deem proper. It has already established a court of claims in which can be brought, first, those claims which are founded on the constitution of the United States or any law of congress; second, those cases founded upon a regulation of an executive department; third, cases of contract, express or implied, of the government; fourth, actions for damages, liquidated or unliquidated, in cases not sounding in tort.

The supreme court has held that a state may sue in the court of claims notwithstanding the provision of the constitution that gives to the supreme court original jurisdiction in those cases in which a state shall be a party.

United States *vs.* Louisiana, 123 U. S. 32.

It is very doubtful whether a claim of this kind could be brought in the court of claims for the reason that it is probably not that kind of a contract which is contemplated by the act. *See*

Russell vs. United States, 182 U. S. 530;
Hartley vs. United States, 198 U. S. 229-234;
vs. United States, 46 Ct. Claims 601.

But there is a statute of limitations for the court of claims of six years, and inasmuch as the states can not bring themselves within any of the excepted classes it is believed that it would be useless for the state to attempt to sue on this claim in that court. (*See* Judicial Code, Sec. 156.)

It is further urged that the states should have the right to sue the United States in the supreme court, independent of any of the matters presented above. It is pointed out that now any citizen, alien, corporation, or Indian can sue in the court of claims and that it would be conducive to good feeling to extend this privilege to the states.

In the case of Virginia *vs.* West Virginia, 220 U. S., at page 27, the court defines the broad powers of the supreme court in cases between states. Justice Holmes there uses this language:

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code govering the matter, and that this court may be called on to adjust differences that can not be dealt with by congress or disposed of by the legislature of either state alone.

In Kansas *vs.* Colorado, 206 U. S., 46, the court says:

In a qualified sense and to a limited extent the separate states are sovereign and independent, and the relations between them partake something of the nature of international law.

It is contended that the same principle should obtain in controversies between any state or states upon the one side and the United States upon the other; and, independent of the merits of this claim made on behalf of the original thirteen states, this highest tribunal in the land ought to be entrusted with all controversies between the states and the government. It is urged by the proponents of the bill that, if the contention of the thirteen original states to correct, the United States is in the position of a defaulting trustee, and has declined to permit its own courts to decide upon the facts and the law on which this claim is based. The matter is of such great importance that a majority of your sub-committee has felt constrained to report the facts and leave the final disposition of the subject to the full committee.

It is noted that in this report it is suggested that on account of the statute of limitation contained in the court of claims act the state could not sue on this claim in that court. However, since that report has been made it has been ascertained that the United States has in its hands about 67,000 acres of this land undisposed of, and therefore there could not be any question of the statute of limitations which could be successfully urged. It will be also noted that there are two reasons why West Virginia, so it is claimed, can not sue. One reason, because no state can sue the United States government except by its consent. This question and the reasons why authority should be given a state to sue are fully discussed in another report made to the United States senate from the committee on judiciary of the United States which is of such importance that I make it a part hereof.

COMMITTEE PRINT.

64th Congress) SENATE. (Report
1st Session) (No...

STATE SUITS AGAINST FEDERAL GOVERNMENT.

———Ordered to be printed.

Mr. Chilton, from the Committee on the Judiciary, submitted the following:

REPORT.

(To accompany S. 5126.)

The Committee on the Judiciary, to whom were referred S. 902, S. 4059 and S. J. Res. 68, all of which sought to give the consent of the United States that suits may be brought against it by the States, beg leave to report as follows:

In addition to the above, bill S. 3346, giving to the court of claims jurisdiction to adjudicate certain claims of the state of Massachusetts against the Federal Government, was also referred to the Committee on the Judiciary, but that bill was reported back to the senate and the Committee on the Judiciary was discharged from further consideration thereof and the same was referred to the Committee on Claims. However, if the solution of the subject made by the Committee on the Judiciary shall be approved by the senate, it is submitted that there may be no need of any further consideration by the senate of that bill.

The committee recommend as a substitute for all the bills above mentioned and pending before it, the following:

Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled, That any state which now has or hereafter shall have a cause of action

against the United States, which, as between individuals, would be cognizable in a court of justice, is hereby authorized to sue the United States thereon in the Supreme Court of the United States. The United States shall have the right in any such suit to interpose any counter-claim, set-off, equitable or other defense which could be made by the defendant were such suit between individuals.

Sec. 2. Process against, and notices to, the United States in any such suit may be served upon the attorney general.

And the same is now reported to the senate with the recommendation that the same do pass as S. 5126, and that the said S. 902, S. 4059, and S. J. Res. 68 be indefinitely postponed.

The judicial power of the United States, as fixed by the constitution, extends—

To all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The constitution further provides that—

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make. (Art. 3, Sec. 2).

By the eleventh amendment these powers were restricted as follows:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

It has been held that the United States can sue a state in an original suit brought in the Supreme Court of the United States. (136 U. S., 211; 143 U. S., 621).

In the latter case, on page 643, the court says:

The words, in the constitution, "in all cases * * * in which a state shall be party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a state may be made, of right, a party defendant, or in which a state may, of right, be a party plaintiff.

These cases settle beyond all question the constitutional power of the Supreme Court of the United States to determine any suit in which a state may be a plaintiff or defendant, as well as the proposition that the United States can sue a state in the Supreme Court of the United States. The anomalous rule of allowing the United States to sue a state without the reciprocal right of a state to sue the United States rests upon the doctrine that a sovereign can not be sued without its consent and that the states gave their consent to have suits brought against them by a sister state, or by the United States, when they came into the Union and ratified the constitution. (143 U. S., 646). But the United States has not given its consent to be made a defendant, and the purpose of the bills before us and of this substitute bill is to grant that consent.

The question presented is whether or not it is right, just, and expedient to grant that consent. In the above cited case of the United States *v.* Texas the question at issue was the boundary

line between Texas and the territory of Oklahoma. It seems that the whole of Greer county governed by Texas was involved, Texas claiming that the county was within the boundary of that state and the United States claiming that it was within the territory of Oklahoma. The Supreme Court decided that a proper running of the boundary line put Greer county within the territory of Oklahoma, and, thereupon, the claim of Texas was held to be erroneous and she was deprived of the juriddiction which she had theretofore exercised over the county. The effect of the judgment was to transfer the land and people of the whole county from the jurisdiction of the state of Texas to the jurisdiction of the territory of Oklahoma. If it had happened, by a similar mistake of running the boundary line, that Greer county had been erroneously placed under the jurisdiction of the territory of Oklahoma, the state of Texas would have been helpless, except by an appeal to congress, to correct the mistake. No reason has been assigned, and, as we think, no reason can be assigned, why, in this kind of a controversy, the state should not have the same right to appeal to the judicial power of the United States and to the jurisdiction of the Supreme Court for relief. If the sovereign state of Texas could be compelled to release its jurisdiction of a whole county by virtue of a judgment and decree of the Supreme Court, then it would seem only fair, if the position of the parties were reversed, that the Federal Government should be compelled, by the exercise of the same judicial power, to submit to a full legal investigation and to the decree and judgment which would follow the ascertainment of the facts.

The Senate has very recently passed an act granting to the State of Nevada a large tract of land for the benefit of its school fund. The same kind of grant has been made to other States. Under the terms of the grant to Nevada the State makes certain selections and locations under a plan set forth in the act. After the State shall make the selection and location it is entirely pos-

sible that there may arise a conflict due to one construction by an engineer or other subordinate officer of the Interior Department on the one side and a claim of the State on the other. If the State shall get upon the wrong side of any such controversy the United States can fix the boundary and recover her rights by a suit in the Supreme Court of the United States against the State of Nevada. But if it should so happen that the United States through its officer should claim and occupy any part of the land granted to the State, the latter is left to the arbitrary judgment of the Department of the Interior, right or wrong, and has no recourse to any court.

A bill is pending in the Senate to provide for the development of water power and the use of public lands in relation thereto (H. O. 408). Section 13 of that bill provides:

That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state relating to the control, appropriation, use, or distribution of water.

But, suppose rights are claimed by the State, which rights are, in fact, invaded by the execution of the law of Congress, this might make a controversy between the State and the United States. There would be no trouble for the United States to get relief by a suit in the Supreme Court; but the State, however much its rights might be trampled upon by an executive officer, will be relegated to the tedious processes of Congress for relief.

Instances could be multiplied of the need of this reciprocal right of the State to sue the Federal Government. When we recall that the United States has had dealings with States and that contractual relations exist by virtue of acts of Congress and grants of lands, and that controversies have arisen over boundaries, trust fund, and mutual obligations arising out of these acts and out of actual contracts, it seems that the question

whether or not the Federal Government should be compelled to give the States the right to bring suit against it on the ground of fairness and justice must be answered in the affirmative.

The Federal Government is a sovereign, but so is each of the States. Except so far as they have, by Constitution, granted powers to the Federal Government, these States are supreme. Therefore, the same reasons which can be urged against compelling the United States to submit to being made a defendant in the Supreme Court could be urged on behalf of each one of these States.

In the case of the United States *v.* Texas (143 U. S., 648), in a dissenting opinion by Chief Justice Fuller and Mr. Justice Lamar, the position is taken that the United States can not sue a State in an original suit in the Supreme Court. This dissenting opinion makes no reference to the case of The United States *v.* North Carolina (136 U. S., 211), wherein the original jurisdiction of the Supreme Court was exercised without question; and the only significance to this dissenting opinion is that, as late as 1891, it was seriously denied that the United States could sue a State without the latter's consent.

But for the eleventh amendment, the States would have been compelled to submit to suits brought by individuals, because the original grant of judicial power was broad enough to embrace such controversies. (Chisholm *v.* Georgia, 2 Dallas, 419.) This latter decision, holding that a State may be sued in the Supreme Court by a citizen of another state and that judgment may be rendered in default of an appearance, was made in February, 1793. As a direct result of this decision, on the fifth day of March, 1794, a resolution of Congress was passed submitting the eleventh amendment to the States for ratification. It is hardly worth while to consider to what extent the States then recognized the right of the Federal Government to sue them in an original suit in the Supreme Court of the United States; but it is altogether probable that had the right

been then asserted the eleventh amendment would have contained a provision to compel the United States to submit to a suit by a State to the same extent that the State could be sued by the Federal Government. It must be borne in mind that nowhere in the Constitution is there an express consent given by the State to a suit brought by the United States. That consent is inferred from section 3, article 2. (143 U. S., 646.)

In the last case cited the Supreme Court held that the States having adopted the Constitution "agreed" to the grant of judicial power and original jurisdiction in the Supreme Court in all cases "in which a State shall be a party," without excluding those in which the United States may be the opposite party, and therefore the exercise of original jurisdiction in a suit brought by the United States against a State was not infringing upon the sovereignty of the States, but was "with the consent of the State sued."

It is too late to agree that by the grant of judicial power the States did not mean to create the anomalous condition that if there were mutual accounts between them and the United States, which could not be adjusted out of Court, the State must wait for the Federal Government to bring suit before it could file its sets-off. The thought constantly recurs, however, that the decision leaves the relations between the Federal Government and the States in the position that if the United States should sue a State upon an account, the State might file a set-off which would more than avail to defeat the claim of the United States, and yet might not have a judgment over for the difference between the claim of the plaintiff and that of the defendant. The above considerations make it clear that there are no Constitutional reasons why this bill should not pass. The grant of judicial power extends to "controversies to which the United States shall be a party." The Supreme Court has held that because original jurisdiction is given in those suits "to which a State shall be a party," the United States may sue a State in the Supreme Court.

It is the opinion of this committee that justice is denied when one party can sue and the other can not. It can not long obtain that the United States can sue a State, denying the reciprocal right to the State, without engendering a feeling of distrust, suspicion, and envy which is not conducive to patriotism and cordiality. The sovereign dignity of the states is as much their pride as is the sovereign dignity of the United States. The judicial construction which has envolved an actual consent of sovereign States to be sued by the Federal Government by an interpretation of article 3, section 2, of the Constitution, has clearly created an anomalous and unfair, if not a dangerous, situation. We hear much these days of the rights of States. All admit that insofar as power has not been granted by the Constitution the States are supreme, but the fear is often expressed that gradually the Federal Government is encroaching upon the rights of the States. Is not this one-sided right to invoke the judicial power, in controversies between the Nation and the States, an instance of such an encroachment, as well as a needless denial of justice?

The suggestion is made that this Republic, composed of 48 sovereign States, each with equal dignity and rights, and all, outside of the granted powers in the Constitution, real sovereigns has so construed the grant of judicial powers and of jurisdiction to the Supreme Court as to leave the States, in their contractual relations with the Federal Government, but half sovereigns. A national tribunal has been created which has jurisdiction over all suits to which a State may be a party, and yet the States are in the humiliating position of being compelled to submit to a suit brought by the Federal Government without the reciprocal right of compelling the Government to submit to a suit brought by a State in the same kind of a controversy. In other words, the Federal Government, one sovereign, can compel the State, another sovereign, to keep the latter's obligations; but, no matter how solemn may be the duty

and the obligation of the Federal Government, the State is powerless to enforce it. Does not such a condition imply a misconception of the purposes and objects to be attained in giving original jurisdiction to the Supreme Court? How can we expect the States to be satisfied, to feel that security which comes only with the consciousness of justice, when the enforcement of justice is one-sided and arbitrary?

The general grant of judicial powers in suits in which the United States may be a party and the grant of original jurisdiction in the Supreme Court in a suit in which a State shall be a party have been so construed as to read that "the judicial power shall extend to suits to which the United States shall be a party plaintiff," whereas the Constitution meant to create a tribunal to try cases in which the United States is a "party."

The substitute bill put into operation the full judicial power granted by the Constitution.

Upon the grounds of expediency, nothing can be urged against this bill, except the possibility of the United States having to defend many suits. Such a claim is an indictment of each one of the 48 States of the Union. It is unfair to the States and entirely inconsistent with their sovereign dignity to presuppose that any of them will attempt to implead the United States except in a controversy which has received careful consideration and which cannot be adjusted except by an appeal to the highest court in the land and is of such importance as to demand that judgment.

It might as well be argued that the United States would, upon slight cause, harass the States as it is to contend that the States would, except in the utmost good faith, sue the United States. The States act by the authority of their legislative bodies and through their executive departments. There is nothing in the past history of the Government of the States to justify the belief that the Legislature of a State would authorize a suit to be brought against the Federal Government unless it was concern-

ing a matter of great importance which could be settled in no other way. If the Federal Government has not abused its right of suit against the States, so we may well conclude the States will not abuse the proposed legislature. The 48 sovereigns of the United States may well be trusted to confine their suits brought under the proposed legislation to matters which comport with the dignity of the Supreme Court and the high regard which the people of the country have for that tribunal.

In the opinion of this Committee, the proposed legislation will make for peace, contentment and good feeling. The Supreme Court of the United States is the National tribunal. It now tries controversies between States involving all sorts of questions of boundaries and mutual obligations. (N. J. *v.* N. Y., 5 Peters 284; R. I. *v.* Mass., 12 Peters, 657; Mo. *v.* Iowa, 7 Howell, 660; Fla. *v.* Ga., 17 How., 478; Ala. *v.* Ga., 23 How., 505; Mo. *v.* Ky., 11 Wall., 395; Va. *v.* W. Va., 11 Wall., 39; Nebr. *v.* Iowa, 143 U. S., 359.)

An investigation of the records in those suits will show that they were not instituted for slight cause, but that the controversies embrace matters which were in good faith in dispute between the parties and were of such dignity and importance as to demand decision by the Supreme Court of the United States. There is nothing in any of these cases to warrant the suggestion that the States acted hastily in bringing the suits. It is submitted that to legislate upon the assumption that one sovereign State of this Union would abuse the jurisdiction of the United States Court is entirely out of harmony with the history of this country, the conduct of the States in the past, and is almost insulting to the sovereign dignity of the State.

The proposed legislation limits the suits which can be brought under its provisions to those which would be cognizable in a court of justice "between individuals." That clause was intended to exclude any chance of involving a political right or claim as the subject matter of a suit. There was inserted in the

bill the right of the United States in any such suit to interpose any counter-claim, set-off, equitable, or other defense, which would be made by the defendants, were such suit between individuals. One of the purposes of that clause was to make it perfectly clear that where the questions involved would be the settling of accounts there could be no doubt of the right of the United States to interpose any matter which might make the settlement complete.

In the case of Virginia *v.* West Virginia (220 U. S. 27), the Supreme Court held that in suits between two States—

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone.

And in Kansas *v.* Colorado (206 U. S., 46), the court said:

In a qualified sense and to a limited extent the separate States are sovereign and independent, and the relations between them partake something of the nature of international law.

Inasmuch as the Court announced this principle upon the ground that the parties to the suit were sovereign, the same rule would apply in controversies between the United States and a State.

In the case of Virginia *v.* West Virginia (220 U. S.) it was held that in the exercise of its original jurisdiction, the Supreme Court is not bound by any special rule or by any particular form of pleading, but that it could exercise its original jurisdiction in its own way. Suits brought under the proposed act would, of course, be governed by this rule.

It seems from this report that we are in the strange position which enables the United States Government to sue any state

in the Supreme Court and does not allow any state to sue the Government except with the consent of the latter. Another reason urged why West Virginia can not sue is that she was not a party to the original contract or deed of cession. It is believed that, in a suit in equity brought in a court of general jurisdiction, the equities of West Virginia arising out of the fact that the territory of West Virginia was a part of Virginia at the time the latter made the deed of cession would be ample to give such a court the right to adjust the claim of West Virginia. But in a statutory court like the Court of Claims this jurisdiction is limited to matters arising out of contract, and it is seriously doubted that West Virginia could by any possibility maintain a suit in that court. But since the matters arose out of contract and since the State of Virginia was a party to the contract, and since the trust is not settled so that there would not be any ground for pleading the statute of limitations, and since the Supreme Court of the United States in the case of the United States against Louisiana, 123 U. S. 32, decided that a state may sue the United States in the Court of Claims, I desire to call the attention of the Legislature to the duty which this state owes to its people and its taxpayers to take advantage of what I believe is now the obligation of Virginia to press this claim.

If I am right, there is a large sum of money amounting to many millions of dollars which is due to the State of Virginia and West Virginia from the Federal Government arising out of this conveyance of the Northwest Territory. As between each other, they stand in the position of partners, and, according to the ratio of ownership in the joint assets, West Virginia would own 23½% and Virginia 76½% of these joint assets.

The total acreage embraced, according to government surveys, in the cession, amounted to 170,208,613 acres, and out of this Congress seems to have donated to local uses, contrary to the deed, 38,864,189 acres, which, valued at $2 per acre, the

price fixed by Congress when these lands were offered for sale by the Act of May 18, 1796, would amount to $77,728,378. In addition to this, proceeds of the sales of lands amounting to $2,953,654.70 were likewise donated to local uses, making an aggregate of donations contrary to the deed of $80,682,032.70.

In addition to this, my imformation is that the trust has not even yet been entirely administered, but that there remains on hand undisposed of several thousand acres of these lands; and, not adding the value of these to the value of the local donations above ascertained, and allowing unto Virginia one-seventh thereof as her residuary interest in the trust, there would be due and payable from the Government of the United States to the State of Virginia $11,526,004.67 in principal, in which West Virginia would share in the same ratio that she is compelled to contribute to the liquidation of the public debt.

However, if Virginia can sue in the Court of Claims and West Virginia cannot it is clearly the duty of Virginia to bring this suit and reduce to possession this joint asset, and credit upon the claim which she is now asserting in the Supreme Court of the United States West Virginia's part of it, which Senator Chilton believes will be enough to pay even the judgment rendered by the Supreme Court and probably leave a balance.

This matter was presented to me by Senator Chilton in a letter dated September 9, 1916, as follows:

"W. E. CHILTON, W. VA., Chairman,
Henry Fry, Clerk.
John E. Scaggs, Assistant.

UNITED STATES SENATE,
COMMITTEE ON THE CENSUS,
WASHINGTON, Sept. 9, 1916.

My Dear Governor:—

I consider it my duty to write to you concerning the status of West Virginia's claim against the United States and its rela-

tions to the debt suit. In a matter where the best interests of our state is concerned I have no politics. As you remember I was earnest in helping you find claims which could be properly introduced before the Court to cut down the claim of Virginia and congratulate myself that the data which I sent you was ample to show at least one credit of a large amount which was allowed. But I need not dwell on this at the present time. We are now confronted with the fact that West Virginia has a judgment against her which now amounts to approximately thirteen millions of dollars. A motion is pending, which the court said would be decided in a reasonable time after the next meeting of the Legislature, to compel West Virginia to pay this judgment.

It will do no good to discuss now the right or power of the Court to compel the state to pay this judgment. While the lawyers are arguing this question it seems to me that the friends of the state who are charged with the responsibility in the premises should be working upon the practical way to do what statesmanship would seem to dictate. As you know, I have been for the last four years working upon the claim of West Virginia arising out of the conveyance of the Northwest Territory. My bill seeks to give authority to West Virginia to bring a suit in the Supreme Court of the United States against the government, and if this authority shall ever be given there can be little doubt of the right of the state to recover. The language of the original trust agreement is too plain to admit of any doubt of the correctness of the claim of Virginia and West Virginia in this trust.

When I introduced the bill and made my first speech in the Senate on the question I was joked for my supposed impudence, but I kept on from one session to another gaining supporters one at a time until finally I passed the bill through the Judiciary Committee at the present session and got the bill upon the calendar with a favorable report from that committee. But there never has been a minute of time when I could get the bill up without unanimous consent. All the time we have had unfinished business and this unfinished business has been a part of the program of the President or democratic party, and while many of them might favor my bill as a single proposition, many of them would not vote to displace the President's program to take up a bill of a private nature. Whenever the calendar would

be called and this bill would be reached an objection was always raised and under the rule this put the bill over unless I could get the Senate to vote otherwise, and inasmuch as every one else would have bills upon the calendar and with hopes of reaching those bills, I could not get a majority vote to delay the calendar long enough to vote to consider this bill. Yesterday before the Senate adjourned I went to Senator Smoot and asked him frankly to tell me whether or not he was watching that bill and had been instructed to see that objection was made to it and he told me that such was the case and he could not let me bring it up at this session.

At one time Senator Sutherland objected; at another Senator Nelson; at another Senator Townsend; at another Senator Brandegee, and so on. Finally I moved to take the matter up out of order, but owing to the peculiar situation of the calendar and of the unfinished business, even the friends of the bill could not give me support. I know from personal interviews with Senators that I have a large majority of the Senate for it. Every democratic Senator will vote for it except possibly Senator Culberson, and Senators Lodge, Gallinger, Sterling and others have told me that they favored the bill.

Its failure to pass at the present session does not cause it to fail, because when Congress meets in December it will still have its place on the calendar with a favorable report, and such will be the status until the expiration of this Congress on the 4th of March next, and I have little doubt that the bill can be passed in the Senate because in December we will not be working under high pressure as we have been at this session. I have talked about this matter to members of the Judiciary Committee of the House, notably Chairman Webb and Congressman Neely, and it is so clearly a state's rights bill and a matter of simple justice to all of the states that these two members feel some confidence in their ability to pass it in the House. My reason for wanting jurisdiction in the Supreme Court is to conserve time and to get the advantage of having the suit thrashed out in a Court of full powers. But the delay in the passage of my bill should not delay the State of West Virginia in getting relief to which she is entitled by virtue of the claim and its assertion.

In the case of the United States against Louisiana, 123 U. S., 32, it is held that a state may sue in the Court of Claims. When I introduced my bill in 1912 I thought there was some doubt

whether or not a state could sue in the Court of Claims on this particular claim. My doubts arose out of the question whether or not the sale of the northwest territory contract was such a contract as gave jurisdiction to the Court of Claims, and, second, whether or not the statute of limitations of six years fixed in the Court of Claims would bar us. There was, of course, the third reason that West Virginia was not a party to the grant of the northwest territory and we would have the additional trouble of bringing West Virginia into a contractual relation with the Federal Government. Since that time I have discovered that the trust is not yet settled and that the government of the United States has in its hands 67,000 acres of that land unsold. These lands lie in the states of Wisconsin, Michigan and Minnesota, and it would seem to me quite clear that if the northwest territory grant did make a trust in the Federal Government and a part of the trust subject is still in the hands of the Federal Government the latter could not plead the statute of limitations on any matter arising out of the settlement of that trust.

Whether West Virginia can sue or not at the present time may be doubtful, but I know of no reason why the state of West Virginia may not sue in the Court of Claims for a settlement of that trust and the recovery of what may be due her thereunder, and, of course, whatever would be recovered would belong to the two states, Virginia and West Virginia, in the proportion figured by the Court of Appeals in the debt suit, to-wit, 23 per cent to West Virginia and 77 per cent to Virginia. I am satisfied that with a correct figuring of the amount of this land which has been sold and disposed of by the government and the prices received by the government at the time it was disposed of, the part which would come to West Virginia would be probably twelve or fifteen millions of dollars.

Might you not well take into consideration at once the course of filing a bill in equity against Virginia in the Supreme Court of the United States alleging this northwest territory trust, the fact that large amounts of this land had been sold and the money paid into the treasury, large quantities of the land conveyed to colleges and to others in violation of the trust, and other facts, showing approximately the amount which in justice would be coming to the two states, Virginia and West Virginia? Then take the position that Virginia can sue in the Court of Claims and West Virginia's right to do so is at the best doubtful, and

now since Virginia has brought a suit to ascertain the amount which West Virginia owes Virginia, before the latter can compel West Virginia to pay this claim Virginia should reduce to possession the joint assets, which, after reduced to possession would wipe out the original joint debt and leave nothing for West Virginia to pay. Let me illustrate. If A and B were in partnership and a part of the partnership business was a contract in A's name to build a lock and dam for the government. A makes the contract with the government, gives the bond and the government looks to A for it and will not allow him to assign it to the partnership, and yet as between A and B all of the profits arising from the contract belong to the partnership. Afterwards A settles up the business and finds that the partnership is indebted $40,000, which he pays and then brings a suit in equity to settle up the partnership, alleging that B owes A $20,000, or one-half of the amount paid by A. B answers that the bill is true but that the contract which A had with the government was in equity a firm contract and that the government really owes A $40,000 for which A can sue in the Court of Claims and B cannot, and B asks the court to restrain the hands of A from enforcing the claim against B until A sues the government and recovers the amount due under the contract. Certainly a Court of Equity would look with favor upon such a cross bill and would be justified in compelling A to bring the suit.

There is a greater reason for applying this principle in the controversy between Virginia and West Virginia than in a suit between private individuals. The court has more than once said in the pending case that it will not deal with a sovereign state in the same technical way that it deals with an individual. Now inasmuch as the Court of Claims is a statutory court created for the adjudication of claims against the government and the exact status of West Virginia to Virginia is not exactly contractual in the narrow sense, but was one of those conditions created by political changes and must be worked out upon lines which take into consideration not only equitable principle but political history and the idea that a sovereign state can act only through its officers who are restricted by constitutional provisions and legislative enactments, the reason for applying the principle which I would invoke becomes stronger than in the case between A and B which I have stated. Of course the

court may decide that the bill comes too late and there are many other answers which could be given to my proposition, but I consider it my duty to present this idea to you who now represent the state of West Virginia in this most important matter.

In discussing my bill in the campaign which is about to open all of these matters will naturally come to my mind and will be presented to the people. I cannot deal with the people of West Virginia except in the utmost frankness. I have no doubt that in the end my bill will be passed by congress. I have the votes to pass it when that is the sole question for consideration. I am speaking now of the senate. I feel sure that the same considerations which have induced the senate to consider it favorably will induce the house to act favorably. It would be a short case if the Supreme Court had jurisdiction. But my interest in the subject and my sincere desire to avoid the calamity of West Virginia having this burden to bear induces me to make the above suggestion to you for whatever you think it worth. I could not have any personal interest in this because my position as United States senator would make it improper for me to represent the state in the suit. Indeed, if I did not have this notion of propriety I would take that position because if I in any sense were employed or retained it might detract from my influence in pushing the bill in which I am so deeply interested.

The great trouble about our claim is that a very few of our people have studied it sufficiently to become acquainted with its merits. A great many of our people have the general idea that it is an old claim and has been buried under the dust so long that it could not have much merit in it. A great many others dismiss it with the idea that I have simply been playing politics. But it does seem to me that when a body of lawyers like the Judiciary Committee of the United States senate has dignified my position with a favorable report it is time for West Virginia to wake up to the fact that she has some rights which it is her duty to take care of. I have been trying to get the people all the information which I had upon the subject. I have tried to keep you and Attorney General Lilly posted upon every move here. I am indeed sorry that I could not get this bill through before adjournment, and in the utmost good faith I give you the benefit of my judgment.

Very truly yours,

(Signed) W. E. Chilton.

Hon. H. D. Hatfield,
Governor of West Virginia."

To which I made the following reply:

12" September, 1916.

My dear Senator Chilton:—

Your communication of September 9th has been read with a great deal of interest and has impressed me very much indeed.

The motion you speak of that is pending in the Supreme Court of the United States was disposed of by that court upon one point made by Judge Holt, who represented the state, in resisting the motion of the Virginia representatives in asking that the Supreme Court of the United States proceed to collect the judgment it had rendered against West Virginia; but no doubt the same motion or one similar in substance will be submitted to the court after our session of legislature in 1917 in case the actions of that body do not meet with the approval of the Virginia authorities. But whatever may be the future action of the Virginia attorneys, I thoroughly agree with you that the officials of West Virginia who are responsible for the welfare of the state should be working co-operatively and in a statesmanlike way to do whatever they can that will bring relief to the state and its citizens.

I have watched your work relative to the northwest territory with a great deal of concern and I truly hope that your efforts will not be in vain, nor do I feel that they will be, because the position you take is equitable and just; and I am glad to have you say that there is little doubt but what, if the bill becomes a law, there is indeed small chance for the State to lose in recovering its equitable part out of the trust fund that grows out of the Northwest Territory on account of West Virginia being a part of the territory of one of the original thirteen States from which this valuable property comes and for which the Federal Government has not settled the claim that is held against the Government for any part of this territory of land.

I remember quite well when you introduced your bill and the adverse criticism that was made to some as to the fallacy of your idea. You had talked with me about this matter and I was impressed with the soundness of your position. Of course, not being a lawyer I could not appreciate it as those who were lawyers might have, but who did not seem to be interested or enthusiastic at least about the proposition.

I note with regret your inability at the last session of the Senate to get this bill passed, notwithstanding it had been recom-

mended favorably by the Judiciary Committee, and that you feel when it comes to a vote there is little question of a majority of the Senate assenting to its passage. I feel that I can appreciate your experience along this line in a slight way on account of the small amount of training I received while a member of the State Senate of West Virginia, and I can understand how embarrassing and exasperating it is to have a measure so meritorious hanging in this way on account of the fact that someone else has something that they feel is more important than a matter which is so vital to West Virginia, affecting the citizenry and our State's future as this principle does. I am glad to know that its failure of passage at this session of Congress does not mean a reconsideration of the whole matter at the coming session, which begins in December, and I truly hope it will become a law at the coming session; and I want to assure you that if there is anything I can do as Governor of West Virginia to expedite the passage of this bill it will afford me much pleasure to join you in your efforts in this regard.

I also note with much interest that your failure to get this bill passed which would permit West Virginia to litigate her claim on the Northwest Territory before the Supreme Court should not delay the State in getting the relief by filing a bill in equity against Virginia in the Supreme Court of the United States, requiring her to reduce to possession the joint assets of the two States in their claim on the Northwest Territory. I thoroughly understand your idea. It seems to me rational and I am quite willing to join with you at any time either in Washington or elsewhere in a conference preparatory to instigating the litigation in the Supreme Court of the United States as outlined by you.

I can understand your great effort and the seeming lack of interest taken by the citizenry, and I might even go farther and say, by those whose duty it is to safeguard and protect the interest of the State in this respect. I have had my experience along this line and I feel that I am in position to appreciate your position. It was indeed hard for me to impress upon some the idea of equities in the way of credits that were legitimately due West Virginia on account of the sales of certain properties that were developed by the State of West Virginia out of the money that was originally borrowed by that State for internal improvements and later sold by her and from which she enjoyed all the increment. The mother State did not account to West

Virginia for any proportional part of what she realized out of the sales of these properties, but in her declaration and in the argument presented by her attorneys she insisted upon West Virginia assuming 33-⅓ per cent originally of the debt, but she did not say one time through her counsel that West Virginia was entitled to any proportional part of the money that the mother State had realized out of the sales of these properties which she had sold, which had been bought with the money she had borrowed originally for the purpose of internal improvements, and which she was asking the Supreme Court gave us the short period of five months to pay 33-⅓ per cent of the original. After we were successful in this respect in convincing some that we were entitled to credits, the Supreme Court gave us the short priod of five months to investigate a record which covered a period of ninety years and to present our claims to the Master, who in turn was to make a report in that period of time to the Supreme Court of the United States. The Court awarded us a credit amount to something over three millions of dollars, which reduced the original judgment of seven million two hundred and fifty thousand dollars to a little in excess of four millions of dollars.

* * * * * * * * I certainly feel there is merit in your position and that you are entitled to support, and I stand ready and willing to give to you every ounce of energy and influence I possess that will be helpful in protecting West Virginia in this long-drawn-out litigation, which should have been adjudicated fifty years ago.

I shall be very glad to have a conference with you as soon as you can arrange it, and to go into this matter in all seriousness.

I want to thank you for the great interest you have taken, and to ask you to write me and make any suggestions at any time that you feel inclined to make.

Believe me

Faithfully,

(Signed) H. D. Hatfield.

Honorable William E Chilton,
Washington, D. C.

HDH:MP

This correspondence sets forth what I have in mind now.

West Virginia is one of the states of this Union. She was admitted into the Union during the Civil War; she was recognized as a child of the war whose admission was much desired by the United States because of her geographical position, and every move connected with her admission was inspired by a desire to carry out the celebrated toast of Andrew Jackson, "Our Federal Union; it must be preserved." There is no use to warn the people of West Virginia against any spirit of opposition or rebellion to constituted authority. This State is in the Union to stay and we will patriotically live up to every obligation demanded by the Constitution.

The Supreme Court has decided that we owe an immense sum of money for interest. This looks to us like a most burdensome charge, and we feel sure that the great Court will listen to any reasonable plea which the State may make looking to a review of that question, and I would, therefore, recommend to the Legislature that we respectfully but earnestly present to the Court a petition for a rehearing of the matter of the interest upon the debt.

This controversy has indeed sorely tried the patience of West Virginians for many years, and on numerous occasions this State, through its representatives, has tried sincerely to adjust the difference with the mother State, but up to the present these efforts have proved in vain. It was attempted through the Bennett Commission in 1871, as I have heretofore indicated, and again—but the arbitrary action of the Commission in insisting that West Virginia's representatives agree to a stipulation fixing the proportional part of West Virginia's obligation at one-third of the total before any negotiations took place, made it an impossible proposition for West Virginia to accept. In March, 1914, West Virginia's representatives again offered a basis of settlement, after deducting from the principal fixed by the Supreme Court certain credits which had been procured

from the records of the mother State. But again Virginia's representatives refused a respectful consideration of West Virginia's contentions. These were later proven to be right in principle and in equity. West Virginians are willing to assume any obligation that presents itself after a just and equitable basis of settlement of this controversy has been accepted, but the State is handicapped seriously in its efforts by the lack of co-operation in bringing out the facts which are material in the consideration of the equities. We have asked for no special consideration or advantage. It is to the interest of West Virginia to see a speedy end to this controversy. The passing of years has worked only to our disadvantage, rendering obsolete the many avenues of proof that were once available in the sustaining of West Virginia's contentions as to assets jointly owned by the two commonwealths. In the recent litigation it has been necessary to delve into the rubbish in the archives from many departments of government, both state and national, as well as from private corporations, which has cost much in time, patience and money, and with all of these efforts upon the part of West Virginia the mother State, through her representatives, has stood aloof upon technical legal rights, and with no seeming inclination to settle the controversy upon a broad ground devoid of untechnicalities, as was pointed out as the ground upon which it should be settled when the Supreme Court passed upon the disposition of the case. The Court took the ground that the matter should be considered upon broad untechnical lines as a controversy between two sovereign states. The question naturally comes to us, how long do the representatives of Virginia and the bond holders expect to continue this arbitrary attitude? I am of the opinion that so long as this position is maintained by them the longer it will take the representatives of West Virginia, on account of the embarrassing position they occupy with respect to the availability of the records in this controversy

heretofore discussed in their efforts at adjudication of all equities that must be considered and passed upon before justice is done and the litigation ended.

Although reported favorably by the Judiciary Committee of the Senate, Senator Chilton's bill that would give to the State of West Virginia the right to sue the Federal Government for recovery of its proportionate part of this claim has not yet been enacted into law, and it would seem to me appropriate that a memorial should be adopted at this session of your honorable bodies asking the representatives in Congress from West Virginia to assist in expediting the passage of this bill. Provision should also be made by the Legislature for having presented to the Supreme Court of the United States the contentions of West Virginia as to why Virginia should be restrained from pressing her claim against West Virginia further, until the state of Virginia sues in the Court of Claims, as I am informed she can, for the purpose of recovering her claim growing out of the cession of the Northwest Territory, and thereby reducing the joint assets of the two states to a common fund which will place the states in a position to receive their proportionate credits and to end further litigation.

I am indebted to Senator Chilton, who has made a persistent study of this subject in the patriotic hope to be able to render to his State a distinct service; and to Honorable John H. Holt, who has been untiring in his efforts to assist me in any and all phases of the situation growing out of this litigation. I am also thankful to the Honorable John W. Mason and feel deeply grateful for the efforts he has made to bring success to the common effort made by those whose duty it is to serve the State in this matter.

I therefore respectfully submit these matters to you for your careful consideration, and with the sincere hope that with the facts that have been developed during my administration, as well as facts developed with previous administrations, that some

suggestion will be forthcoming that will result in the protection of the interests of our State in this litigation and bringing about the consideration of further equities which West Virginia is entitled to receive, and after the proper equities have been conceded to the State, the prompt liquidation of the residue, if any there be.

Respectfully submitted,

H. D. HATFIELD,
Governor.

January 17, 1917.

IN THE

Supreme Court of the United States

Original No. 2 **October Term, 1916**

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

vs.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ, *et al.*, Senators of the State of West Virginia; HONORABLE JOSEPH S. THURMOND, *et al.*, Members of the House of Delegates of the State of West Virginia,

DEFENDANTS.

COMPLAINANT'S BRIEF IN SUPPORT OF A MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND FOR AN ORDER TO SHOW CAUSE.

R. P. HILL PRINTING CO., PRINTERS, RICHMOND, VIRGINIA

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DEFENDANTS.

COMPLAINANT'S BRIEF IN SUPPORT OF A MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND FOR AN ORDER TO SHOW CAUSE.

The Commonwealth of Virginia has no other effective remedy than mandamus and will be unable to satisfy the judgment entered by this Court in its favor on June 14, 1915, for $12,393,939.50, with interest and costs, unless this Court by its writ of mandamus commands the members of the West Virginia Legislature to provide for the payment of the judgment.

The Commonwealth of Virginia moved this Court on June 5, 1916, for a writ of execution, which was denied, and in opposing the motion the State of West Virginia answered that not only presumptively but in fact the State of West Virginia did not then own, and before, at the time of, and since the ren-

dition of the judgment had not owned any property, real or personal, which was subject to execution.

The West Virginia Legislature met in regular session on January 10, 1917, and must adjourn on or before February 24, 1917, unless by the concurrence of two-thirds of the members elected to each house its session is further continued beyond said date, and the Legislature can not meet again until the second Wednesday of January, 1919, unless convened by the Governor. The West Virginia Legislature has taken no steps whatever to provide for the payment of the said decree and judgment, and in consequence of the time which has already elapsed without any effort being made by the said Legislature to perform its duty in the matter of the assessment of a tax adequate to meet the payment of the said decree and judgment, there will be insufficient time for the assessment of the said tax unless the Legislature promptly and without further delay performs its duty in the matter of the assessment. It appears from the letter of the Governor of West Virginia to the Chairman of the Debt Commission, dated January 9, 1917, that it is not the intention of the authorities of West Virginia to take any steps by legislation or otherwise to bring about either the levy of a tax or the payment of the said judgment and decree; but it is the intention to delay the said payment under pretext of "negotiating" the real amount payable by West Virginia to Virginia, or of applying for a "rehearing," etc., until it will be too late for the Legislature of West Virginia now assembled to take any action in the matter of making provision for the payment of the said judgment and decree.

Under these circumstances the complainant is entitled to a writ of mandamus. This writ is a proceeding ancillary to the judgment which gives jurisdiction, and when issued it becomes a substitute for the ordinary process of execution to enforce the payment of the same.

Supervisors v. *United States,* 4 Wall., 435;
Von Hoffman v. *City of Quincy,* 4 Wall., 535;
City of Galena v. *Amy,* 5 Wall., 705;
Riggs v. *Johnson City,* 6 Wall., 166;
Walkley v. *City of Muscatine,* 6 Wall., 481;
Labette County Commissioners v. *Moulton,* 112 U. S., 217.

In the last case the Court said:

"Speaking of the writ of mandamus, as employed here, this Court, in *Riggs* v. *Johnson County,* 6 Wall., 166-198, described it as 'a proceeding ancillary to the judgment which gives jurisdiction, and, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract.'" (Page 223.)

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety to issue a mandamus is to be determined.

Kendall v. *United States,* 12 Peters, 524, 617;
Marbury v. *Madison,* 1 Cranch, 137, 170.

In the last named case the Court said:

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

"But where he is directed by law to do a certain act affecting the absolute right of individuals, in the performance of which he is now placed under the particular direction of the president, and the performance of which the president can not lawfully forbid, and, therefore, is never presumed to have forbidden; as for example, to

record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what grounds the courts of the country are further excused from the duty of giving judgment, that right to be done to an injured individual, than if the same services were to be performed by a person not the head of a department. (Page 170.)

"This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired." (Page 173.)

The Court then proceeded to consider the power of the Court to issue the writ. It held that the original jurisdiction of the Court was by the Constitution confined to cases affecting ambassadors, other public ministers and consuls and those in which a State was a party. The case before it was not such a case. Congress did not have power to enlarge the jurisdiction of the Court as prescribed by the Constitution. The writ was denied solely on the ground that under the terms of the Constitution the Court did not have original jurisdiction of such a case; but the Court said that the case was a plain one for a mandamus.

In the present case, however, States are parties, and the case is within the original jurisdiction of the Court. Judgment has been obtained against the State of West Virginia, and a writ of mandamus is a proper remedy to enforce the judgment.

Louisiana v. *Jumel,* 107 U. S., 711.

This case has sometimes been cited as authority for the proposition that a State Legislature is not subject to mandamus; but the refusal to grant the writ in that case was based upon the point that the State had not submitted itself to the jurisdiction of the Court and that no judgment had been obtained agains the State, facts which are present here. It appeared in *Louisiana* v. *Jumel* that the State of Louisiana had issued bonds and provided by statute for a tax with which to meet interest

as accrued and principal at maturity. Later a statute was passed reducing the interest rate and the tax to be levied, and otherwise impairing the obligation of the bonds. Certain bondholders brought a suit in equity against the different State officers, and also filed a petition for a writ of mandamus against these officers. The actions were begun in the State Court and removed to the Circuit Court, and, on a judgment denying relief, were appealed to the Supreme Court of the United States. The State could not have been sued by the bondholders. The bondholders could not have obtained judgment against the State, and the Court refused to permit the bondholders by a writ of mandamus to collect the debt due by the State which they could not enforce in an action. The opinion of the Court in regard to the writ for mandamus is as follows:

> "Little need be said with special reference to the suit for mandamus. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders, can, by the judicial writ of mandamus, compel the executive officers of the State to perform generally their several duties *under the law*. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the Auditor of State, the Treasurer of State, and the Board of Liquidation may be required to enforce the Act of 1874, and 'carry out, perform, and discharge each and every one of the ministerial acts, things, and duties respectively required of them, . . . according to the full and true intent and purport of that act.' Certainly no suit begun in the Circuit Court for such relief would be entertained, for that Court can ordinarily grant a writ of mandamus only in aid of some existing jurisdiction. *Bath County* v. *Amy*, 13 Wall., 244; *Davenport* v. *County of Dodge*, 105 U. S., 237. Our attention has been called to no case in the

courts of Louisiana in which such general relief has been afforded; and the jurisdiction of the Circuit Court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed—a question we do not deem it necessary now to decide. The remedy sought, in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power can not be thus ousted of its jurisdiction and the judiciary set in its place. *When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State can not be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.*" (Pages 727, 728.)

NOTE—*Italics* ours.

We think it is shown by the foregoing that mandamus is the proper remedy by which to enforce payment of the judgment in this case, and that this Court has power to issue the writ.

The Court has taken jurisdiction of this case and jurisdiction includes the power to enforce the execution of what is decreed.

Blackstone says:

> "All jurisdiction implies superiority of power. Authority to try would be vain and idle without an authority to redress, and the sentence of the Court would be contemptible unless the Court had the power to command the execution of it." (Cooley's Edition, Page 242.)

In *Riggs* v. *Johnson County, supra,* the Court said:

> ". . . Jurisdiction is defined to be the power to hear and determine the subject matter in controversy in the suit before the Court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree. (*Rhode Island* v. *Massachusetts,* 12 Peters, 718.)
>
> "Express determination of this Court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record. (*Wayman* v. *Southard,* 10 Wheaton, 23; *Suydam* v. *Williamson,* 20 Howard, 437; 2 Tidd's Practice, 1134; Co. Lit., 288, b.)
>
> "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." (Page 187.)

It is further submitted that the Legislature of West Virginia is under an express constitutional obligation to provide for the payment of the amount ascertained by the Court to be due by West Virginia, and that her obligation to do so is part of the contract upon which the judgment is founded. See Section 8, Article VIII, of the Constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union on June 20, 1863; and also the opinion of the

Court, per Mr. Justice Holmes, in *Virginia* v. *West Virginia*, 220 U. S., p. 1.

It is clearly within the power of the Court to compel the Legislature of West Virginia, in conformity with this constitutional requirement, to make provision for the payment of the decree and judgment, which represent the ascertained equitable proportion of the Virginia debt assumed by West Virginia.

In any event, the complainant, we submit, should have leave to file its petition for a writ of mandamus and the rule to show cause should be granted.

United States ex rel. Miller v. *Black*, 128 U. S., 40.

In this case the Court said:

> ". . . We think that the case suggested by the petition is one in which it would be proper for the Court to interfere by mandamus. Whether it will turn out to be such when all the circumstances are known, can be ascertained by a rule to show cause; and such a rule, we think, ought to have been granted." (Page 52.)

Respectfully submitted,

JOHN GARLAND POLLARD,
Attorney General of Virginia.

WM. A. ANDERSON,
RANDOLPH HARRISON,
SANFORD ROBINSON,
JOHN G. JOHNSON,
Of Counsel.

TABLE OF CASES.

IN THE

Supreme Court of the United States.

Original No. 2. **October Term, 1916.**

COMMONWEALTH OF VIRGINIA,
Complainant,

vs.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ *et al.*, Senators of the State of West Virginia; HONORABLE JOSEPH S. THURMOND *et al.*, Members of the House of Delegates of the State of West Virginia,
Defendants.

COMPLAINANT'S BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF MANDAMUS AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISCHARGE THE RULE IN MANDAMUS HEREIN.

Statement of Case.

On the 14th day of June, 1915, this Court entered its decree and judgment in the suit instituted by the Commonwealth of Virginia, as

complainant, against the State of West Virginia, as defendant, in these words:

> "This cause came to be heard on the pleadings and proofs, the reports of the Special Master and the exceptions of the parties thereto, and was argued by counsel.
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> "On consideration whereof, the Court finds that the defendant's share of the debt of the complainant is as follows:
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> "Principal, after allowing credits as stated, $4,215,622.28; interest from January 1, 1861, to July 1, 1891, at four per cent. per annum, $5,143,059.18; interest from July 1, 1891, to July 1, 1915, at three per cent. per annum, $3,035,248.04, making a total of interest of $8,178,307.22, which, added to the principal sum, makes a total of $12,393,929.50.
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> "It is therefore now here ordered, adjudged and decreed by this Court that the complainant, Commonwealth of Virginia, recover of and from the defendant, State of West Virginia, the sum of $12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent. per annum.
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> "It is further ordered, adjudged and decreed that each party pay one-half of the costs.
>
> "June 14, 1915."

This decree expressed the final judgment of this Court in a suit the complainant had instituted against the defendant, to collect a sum of money alleged to be due it by the latter, as its proportion of a debt which was contracted before the creation of the State of West Virginia out of a portion of the State of Virginia.

The proceedings, anterior to the entry of this decree, had been complicated and long protracted.

The Bill was filed in February, 1906. A Demurrer thereto was overruled, the opinion being delivered in March, 1907 (206 United States, 290). The cause was then directed to be referred to a Master, on the 4th March, 1908 (209 United States, 514). Honorable Charles E. Littlefield was appointed such Master on the 1st June, 1908. Testimony was taken between 16th November, 1908 and 2nd July, 1909. The case was argued before the Master in November and December, 1909. His report was filed 17th March, 1910.

On the 6th of March, 1911, the decision of this Court which fixed West Virginia's share of the principal debt (220 United States 1) was entered.

Virginia moved to proceed with the cause on the 9th of October, 1911; but on objection of West Virginia the Court denied the application (222 U. S. 17). Virginia again moved to proceed with the cause on the 13th of October, 1913; and on objection of West Virginia the Court again denied the application (231 U. S., 89). After argument, this Court granted leave to West Virginia to file a Supplemental Answer on the 8th of June, 1914 (234 United States, 117).

A great mass of testimony was taken under a re-reference made by this Court to the Master, which ended in his filing his final report.

Exceptions were argued in this Court, which rendered its decision on the 14th of June, 1915 (238 United States, 202).

The State of Virginia, acting through its Commission, endeavored to obtain an amicable payment of the money, or some arrangement for

payment, which would be mutually satisfactory. These efforts brought about nothing in the way of a payment or agreement to pay, or arrangement for payment. What was done, and the letters written in the course of these efforts, appear as Exhibits attached to the Motion for leave to issue a writ of mandamus.

On the 12th day of June, 1916, this Court (241 United States, 531), denied a Motion for leave to issue an execution, West Virginia having filed an Answer in which it set forth that it was possessed of no property upon which an execution could be issued.

The Motion, for leave to file a petition for a writ of mandamus, commanding the Legislature to levy a tax wherewith to liquidate the decree, was granted on the 5th day of February, 1917.

The Legislature of West Virginia convenes only once in every second year, unless specially assembled at the instance of the Governor. The day for its biennial convening was the 10th day of January, 1917.

That Motion was made, only after the Legislature, though it had been in session for some considerable time and was approaching its time for adjournment, had done nothing in the way of providing for the liquidation of the indebtedness.

The recommendations of the Governor to the Legislature, none of which looked to payment of the debt, appear in the Appendices attached to the Petition.

A resolution by the Senate, in which the House of Delegates concurred, was enacted on the 21st

February, 1917 (see Motion of West Virginia, *et al.*, to discharge rule and mandamus, 13), in these words:

> " FIRST,—That the Attorney General of the State, with the assistance of special counsel retained by the New Virginia Debt Commission for the purpose, be authorized and directed to appear to and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof, and the several senators and delegates constituting the membership of its respective bodies.
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> " SECOND,—That in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon the mandamus, the Governor is requested, whether that judgment be for or against the State of West Virginia, to convene the Legislature in special session as soon as may be, for the purpose of doing without delay what should be done in the premises.

On motion of Mr. Miller, the rules were suspended and the resolution was taken up for immediate consideration, read by the Clerk and adopted."

In said Answer on behalf of the Legislature of West Virginia was embodied a Motion to quash the rule which had been awarded against the defendants herein to show cause why a writ of mandamus should not be issued. This Motion rests upon an assertion that (1) this Court has no power to compel the Legislature to levy a tax for the purpose of liquidating said decree; that (2) this Court has no power to enforce the judgment by it rendered; and that (3) the issuance of a writ

of mandamus would be contrary to the principles and usages of law.

No fact was averred in said motion which had not been the subject of consideration by this Court antecedently to its entry of its final decree, excepting an averment that on the 1st of March, 1784, a deed to Congress ceding all the territory of Virginia northwestward of the Ohio River in the United States, had been delivered upon the following conditions:

> "(F) That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It was not averred that any claim of this nature had been presented to the State of Virginia antecedently to the entry of the final decree, nor that any money on account thereof had ever been received, or would be received by the State of Virginia; but it was asserted that "Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms"; and that a large sum was due and payable from the Govern-

ment of the United States to the State of Virginia "in which West Virginia should share in the same ratio that she is compelled to contribute to the payment of Virginia's debt, that is to say, she should receive 23–1/2 per cent. thereof."

The claim is stated to be "based upon information and belief".

In view of the answer of West Virginia, which stated that it had no property subject to execution, and of its claim that this Court cannot bring about a payment of its decree by the issuance of writ of mandamus or of any other process, the present record presents this question:

> "If, as the result of a controversy between two States, a decree is entered by this Court against one, in favor of the other, is the Court unable, despite the pecuniary ability of the debtor, to compel payment?"

Past records disclose cases in which municipal bodies have repudiated their sealed obligations; but the State of West Virginia presents, perhaps, the first instance in which one of the great Commonwealths of the Union has repudiated the duty imposed upon it to satisfy a debt decreed to be paid by it.

We will not dignify the suggestion of a defense because of an alleged conditional deed delivered in 1783, with notice, for the obvious reason that not only is the claim upon its own face unworthy of notice, but because one State cannot liquidate an indebtedness owing by it to another State, by setting up a claim that there is an indebtedness owing to it by the United States. Presumably, a claim against a party, thought unworthy of

notice, between 1783 and 1910, would not go far in 1917 towards liquidating an indebtedness owing by a second party to a third.

The claim of inability on the part of this Court to enforce its decree, is one of far-reaching importance. If it be sustained, its decrees will be little better than waste paper.

Our contention is, that though a decree may fail of liquidation because of the debtor's lack of funds, it can never thus fail where the debtor is abundantly able to pay and where a body in the State has power to appropriate the State's funds to that purpose.

Argument.

Upon each of the three great Departments of the National Government are imposed duties, and each, either expressly or impliedly, is vested with powers to perform them. The Makers of the Constitution, where they imposed a duty, granted the power to perform it.

Had there been no Federation, or Union of States, and had each established and maintained an independent position, a debt owing by one to the other could not have been ascertained by a judicial tribunal, nor by such a tribunal could it have been collected, or ordered to be collected, after determination. Either such a debt would have been necessarily collectible only by armed force or by some method of arbitration.

Owing to the commercial, and other, relations, between the States, it was extremely probable that transactions would arise which would result in indebtedness by one to another. It was there-

fore, in view of the abandonment of absolute independence, imperatively necessary that some method should be devised, by which the existence of indebtedness could be determined, and its collection enforced. There was but one Department by which this result could be attained, *i. e.*, the Judicial Department.

There was considerable hesitation on the part of some of the States to permit the citizens of one State to sue another State, and although, in the *Chisholm* case, it was held that this power was conferred by the authority to deal with a controversy between a State and citizens of another State, the Eleventh Amendment deprived citizens of this right to sue, leaving them, however, subject to suit by another State.

By the Third Article of the Constitution it was required that there should be one Supreme Court, though it was permitted to Congress, from time time, to ordain and establish inferior Courts. It was provided that the judicial POWER should extend to many enumerated cases and: "2. To controversies between two or more States."

If the contention of West Virginia be sustained, this clause created not "judicial *power*", but "judicial impotence."

The power conferred over controversies between two or more States was conferred in precisely the same way that power was conferred over controversies "between citizens of different States" or "between a State and citizens of another State."

In *South Dakota* vs. *North Carolina*, 192 U. S. 286, a controversy was held by this Court, though

with a most vigorous dissent, to be one between two States, where bonds belonging to an individual had been transferred to one of the States which became a plaintiff.

About the *bona fides* of the present suit, as a controversy between "two or more States", there can be no question of fact or law.

When, therefore, the State of Virginia presented itself as the suitor plaintiff in this Court, averring the controversy between it and the State of West Virginia, and demanded that the latter should pay it an amount of money alleged to be due, this Court, without dissent and apparently without hesitation, held that the transaction was one over which it possessed judicial "*power*".

We fail to see how anything to the contrary could have been held.

We are, therefore, in the present controversy, presented with a case in which the Court proceeded because judicial power so to do had been expressly vested in it by the Constitution of the United States. It was necessary for it to enter its decree in favor of the plaintiff or of the defendant. The decree which was entered was in the performance by this Court, of a duty imposed upon it.

Can it possibly be, that nothing more was intended by the Constitution, than that this Court should go through the useless, and meaningless, work, of merely making a suggestion to the State of West Virginia that it owed to the State of Virginia a designated amount of money, which it would be right for it to consent to pay?

Would such a proceeding, thus ending in

naught, have been in exercise of "judicial POWER"?

Our adversaries, in the Brief filed on their behalf by the late Mr. Carlisle, entertained a more accurate idea of what is implied in jurisdiction than is now suggested by his colleagues. He said:

> "Jurisdiction is the power to hear and determine a cause between the parties to the action who are before the court, and to render a final judgment or decree and enforce its execution by judicial process. Judicial tribunals cannot take cognizance of controversies merely for the purpose of ascertaining and declaring what the legal or equitable rights of the parties are. They must render judgments or decrees which remedy the wrongs complained of, or enforce the rights ascertained in the case; in other words, their powers are remedial, not merely declaratory.
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> Jurisdiction is defined by Bouvier as 'the authority by which judicial officers take cognizance of to decide causes. Power to hear and determine a cause' (3 Ohio, 494; 6 Pet., 591)."
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> * * * * *
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> "In defining jurisdiction, Black says:
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> 'The power and authority constitutionally conferred upon or constitutionally recognized as existing in a court or judge to pronounce the sentenee of the law or to award the remedies provided by law upon the set of facts proved or admitted, referred to the tribunal for decision and authorized by law to be the subject of investigation or action by that tribunal, and in favor or against per-

sons (or a *res*) who present themselves, or who are brought before the court in some manner sanctioned by law as proper and sufficient. Jurisdiction is a power constitutionally conferred upon the judge or magistrate to take cognizance of and determine a cause according to law and to carry a sentence into execution (6 Pet., 591; 9 Johns., 239; 2 Neb., 135).'"

(Page 33; see also West Virginia Comp., Vol. I, pages 182–183.)

The purpose of the Constitution in conferring judicial power was to substitute it for that of the strong arm; but it was not intended to confer a power merely to pronounce Pickwickianisms.

When jurisdiction was given to this Court, in controversies between citizens of different States, and in cases of admiralty, and in controversies to which the United States should be a party, it was not deemed necessary to prescribe the process of execution or command which would compel performance of its decrees. With the grant of the power went, by necessary implication, the ability to exercise it in usual methods.

It may well be that this Court has no power, itself, to levy a tax. This power rests in the Legislatures of the different States.

There are several cases in which this Court has said that of itself, and by itself, it has no such power of tax assessment.

What it does possess, however, is the power to coerce the performance by the Legislature of a duty necessary to be performed, in order to effectuate its decrees.

Our adversaries refer to the case of *Rees* vs.

Watertown, 19 Wallace, 107, as authority for their proposition of "the absolute inability of a Court to compel a levy of taxes by the Legislature."

Where, however, the learned Justices of this Court spoke of the inability, it referred, not to the inability of the Court to compel those who had power to levy taxes, to do so, but of its inability itself to make the levy.

The *Rees* case was one in which there had been repeated orders upon the municipal body, vested with the duty of assessing taxes, to levy the same,—orders which had been thwarted by the resignation of the persons constituting the taxing Boards.

It was then sought to obtain a specific decree subjecting the taxable property of the citizens to the payment of complainant's judgement, with a direction that the Marshal of the District should be empowered to seize and sell so much of it as might be necessary, and to pay over to the complainant the proceeds of such sale. What was said by this Court was with reference to the refusal of the United States Circuit Court to exercise this power.

This Court recognized the power which had been exercised, to compel municipal bodies, clothed with the power of assessment, to levy a tax; but denied a power in the United States Court to levy the tax.

In *Meriwether* vs. *Garrett*, 102 U. S. 472, the Court was dealing with the inability of the Federal Judiciary to levy the tax, not with any inability to compel those upon whom rested the duty to

assess, to levy taxes necessary to pay the debts of the municipality. This Court said:

> "So long as the law authorizing the tax continues in force, the courts may, by *mandamus*, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.
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> It is the province of the courts to decide causes between parties, and, in so doing, to construe the Constitution and the statutes of the United States, and of the several States, and to declare the law, and when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as

> are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration." (Page 515.)

Kentucky v. *Dennison*, 24 Howard 66, quoted by our adversary, did not decide that this Court did not have power in a proper case to mandamus the Governor of Ohio, but merely decided that Congress had no authority to impose such a duty upon the Governor of a state. This is pointed out in *Ex Parte Siebold.*, 100 U. S. 371, where Mr. Justice Bradley in delivering the opinion of this Court said:

> "If the officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State,—as we think they are,—then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act."
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> "To maintain the contrary proposition, the case of *Commonwealth of Kentucky* v. *Dennison* (24 How., 66), is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the Governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from service was held to belong to the government of the United States, to be effected by its

> own agents; and Congress had no authority to require the Governor of a State to execute this duty." (Page 391.)

Though quoted by our adversary, the case of *Supervisors* vs. *United States*, 4 Wallace, 435, puts in clear relief the duty which can be coerced, of a public officer authorized to do something to which another is entitled. Mr. Justice Swayne in that case says:

> "The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the Act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose a 'positive and absolute duty'. The line which separates this class of cases from those which involve an exercise of a discretion, judicial in its nature, which Courts cannot control, is too obvious to require remark." (Pages 446, 447.)

The syllabus in *Heine* vs. *The Levee Commissioners*, 19 Wallace, 655, a case quoted by our adversaries, reads thus:

> "Where the law has provided that a tax shall be levied to pay such bonds, a man-

> damus after judgment to compel the levy of the tax, in the nature of an execution or process to enforce the judgment, is the only remedy. The fact that this remedy has been shown to be unavailing does not confer upon a court of equity the power to levy and collect taxes to pay the debt. The power to levy and collect taxes is a legislative function in this country and does not belong to a court of equity and can only be enforced by a court of law through the officers authorized by the Legislature to levy the tax, if a writ of mandamus is appropriate to that purpose." (Page 655.)

Mr. Justice Miller, in this case (657) states in very simple language the method of enforcing a decree by a mandamus compelling the persons authorized to tax, to levy an assessment:

> "It has been decided in numerous cases, founded on the refusal to pay corporation bonds, that the appropriate proceeding was to sue at law and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt."

In *Louisiana* vs. *Jumel*, 107 U. S. 711, the bonds and coupons which the parties to the suits held had not been reduced to judgment, and there was no way in which the State in its capacity as an organized political community

could be brought before any Court of the State or of the United States to answer a suit in the name of these holders, to obtain such a judgment.

The parties plaintiff in the *Jumel* case, sought to escape from the inability of citizens to bring a suit against the State, by bringing the suit against certain officials.

As this Court said, speaking through Mr. Chief Justice Waite:

> "The relief asked will require the officers against whom the process is issued, to act contrary to the positive orders of the Supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do." (Page 721.)

To have compelled officials in a suit in which the State was not a party, to act contrary to the power conferred upon them, would, of course, have amounted to a coercion upon the State which was not proper.

It appeared in the *Jumel* case that the State of Louisiana had issued bonds and provided, by statute, for a tax with which to meet interest as accrued and principal at maturity. Later a statue was passed reducing the interest rate and the tax to be levied, and otherwise impairing the obligation of the bonds. Certain bondholders brought a suit in equity against the different State officers, and also filed a petition for a writ of mandamus against these officers. The actions were begun in the State Court and removed to the Circuit Court, and, on a judgment denying relief, were appealed to the Supreme Court of the United States. The State could not have been sued

by the bondholders. The bondholders could not have obtained judgment against the State, and the Court refused to permit the bondholders by a writ of mandamus to collect the debt due by the State which they could not enforce in an action. The opinion of the Court in regard to the writ for mandamus is as follows:

> "Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders, can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the Auditor of State, the Treasurer of State, and the Board of Liquidation may be required to enforce the Act of 1874, and 'carry out, perform, and discharge each and every one of the ministerial acts, things, and duties respectively required of them, * * * according to the full and true intent and purport of that act.' Certainly no suit begun in the Circuit Court for such relief would be entertained, for that Court can ordinarily grant a writ of *mandamus* only in aid of some existing jurisdiction. *Bath County* v. *Amy*, 13 Wall., 244; *Davenport* v. *County of Dodge*, 105 U. S. 237. Our attention has been called to no case in the courts of Louisiana in which such general

relief has been afforded; and the jurisdiction of the Circuit Court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed—a question we do not deem it necessary now to decide. The remedy sought, in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. *When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorising the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.*" (Pages 727, 728.)

NOTE—*Italics* ours.

There is no magic in the word "sovereignty" in connection with the State, where such State had been subjected, in proceedings duly instituted and conducted, to a decree by this Court to pay an indebtedness.

The power of this Court in all cases in which it has jurisdiction over a State, is necessarily supreme. There is no practical difference in the degree of power to be exercised by a Federal Court, which has decreed that a municipal body shall pay a debt, in ordering a mandamus upon the municipal officers to levy a tax, as compared with the issuance of a writ of mandamus against the Legislature of a State which has been decreed to be indebted, compelling such Legislature to assess a tax.

The remedy which is asked for in this case is one which is always pursued in the case of a governmental body, municipal or otherwise, which is indebted and which fails to pay or is unable to pay under execution.

This Court has held, as we have seen, that a levy cannot be made against the property of an individual citizen upon a theory that the citizen as well as the State is indebted; but it has never hesitated to sanction mandamuses issued by a Federal Court against a municipal body vested with the power of taxation, compelling such body to assess.

In the present case, West Virginia has no funds which can be seized. All its property is in public use. It is, however, a very prosperous Commonwealth, abundantly able, by taxation, to liquidate all its indebtedness.

Its Legislature is vested with an unrestricted power to levy taxes to meet its liabilities. Article 10 of the present Constitution of West Virginia relating to "Taxation and Finance" is as follows:

1. Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious or charitable purposes; all cemeteries and public property may, by law, be exempted from taxation. The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.

2. The Legislature shall levy an annual capitation tax of one dollar upon each male inhabitant of the State who has attained the age of twenty-one years, which shall be annually appropriated to the support of free schools. Persons afflicted with bodily infirmity may be exempted from this tax.

3. No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the Auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated, or provided. A complete and detailed statement of the receipts and expenditures of the public moneys shall be published annually.

4. No debt shall be contracted by this State, except to meet casual deficits in the

revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

5. The power of taxation of the Legislature shall extend to provisions for the payment of the State debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State; but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year.

6. The credit of the State shall not be granted to, or in aid of any county, city, township. corporation, or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever.

7. County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation, except for the support of free schools; payment of indebtedness existing at the time of the adoption of this Constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving

the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three-fifths of all the votes cast for and against it.

8. No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years; Provided, That no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same.

9. The Legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same.

This Court cannot compel the exercise of discretion in a Legislature; but it can compel the performance of a duty where such performance is necessary, in order that its decrees may not be treated as idle words.

The Legislature of West Virginia holds the key to the State treasury. By turning that key, funds will be developed which can satisfy the indebtedness owing to the State of Virginia.

It is the duty of the Legislature to levy taxes sufficient to meet its indebtedness. There is no pretense in any of its pleadings that it cannot, by taxation, procure amply sufficient means.

The situation is this: It has been decreed that West Virginia shall pay to Virginia a designated amount. Neither by taxation passed, nor by any other means, has it put into its treasury sufficient funds to pay. Its Legislature has a duty thus to raise the funds. It refuses to perform it. A writ of mandamus is the customary method of compelling the performance of a duty. Why shall the "judicial power" in this case, expressly conferred by the constitution, be set at naught?

A writ of mandamus is a proceeding ancillary to the judgment which gives jurisdiction, and, when issued, it becomes a substitute for the ordinary process of execution to enforce the payment of the same.

Supervisors v. *United States*, 4 Wall. 435;
Von Hoffman v. *City of Quincy*, 4 Wall. 535;
City of Galena v. *Amy*, 5 Wall. 705;
Riggs v. *Johnson City*, 6 Wall. 166;
Walkley v. *City of Muscatine*, 6 Wall. 481;
Labette County Commissioners v. *Moulton*, 112 U. S. 217.

In the last case this Court said:

> "Speaking of the writ of *mandamus*, as employed here, this Court, in *Riggs* v. *Johnson County*, 6 Wall. 166–198, described it as 'a proceeding ancillary to the judgment which gives jurisdiction, and, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract.'" (Page 223.)

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety to issue a mandamus is to be determined.

Kendall v. *United States*, 12 Peters, 524, 617.

Marbury v. *Madison*, 1 Cranch, 137, 170.

In the last named case this Court said:

> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.
>
> "But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president can not lawfully forbid, and,

therefore, is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department. (Page 170.)

"This, then, is a plain case for a *mandamus*, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired." (Page 173.)

The Court then proceeded to consider the power of the Court to issue the writ. It held that the original jurisdiction of the Court was by the Constitution confined to cases affecting ambassadors, other public ministers and consuls and those in which a State was a party. The case before it was not such a case. Congress did not have power to enlarge the jurisdiction of the Court as prescribed by the Constitution. The writ was denied solely on the ground that under the terms of the Constitution the Court did not have original jurisdiction of such a case; but the Court said that the case was a plain one for a mandamus.

In the present case, however, States are parties, and the case is within the original jurisdiction of the Court. Judgment has been obtained against the State of West Virginia, and a writ of mandamus is a proper remedy to enforce the judgment.

This Court has taken jurisdiction of this case

and jurisdiction includes the power to enforce the execution of what is decreed.

Blackstone says:

> "All jurisdiction implies superiority of power. Authority to try would be vain and idle without an authority to redress, and the sentence of the Court would be contemptible unless the Court had the power to command the exscution of it." (Cooley's Edition, Page 242.)

In *Riggs* v. *Johnson County*, *supra*, this Court said:

> "* * * Jurisdiction is defined to be the power to hear and determine the subject matter in controversy in the suit before the Court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree. (*Rhode Island* v. *Massachusetts*, 12 Peters, 718.)
>
> "Express determination of this Court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record. (*Wayman* v. *Southard*, 10 Wheaton, 23; *Suydam* v. *Williamson*, 20 Howard, 437; 2 Tidd's Practice, 1134; Co. Lit., 288, b.)
>
> "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." (Page 187.)

As we have said the Legislature of West Virginia is under an express constitutional obligation to provide for the payment of the amount ascertained by the Court to be due by West Virginia. Her obligation to do so is part of the contract upon which the judgment is founded. See Section 8, Article VIII, of the Constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union on June 20, 1863; and also the opinion of the Court, per Mr. Justice Holmes, in *Virginia* v. *West Virginia*, 220 U. S. 1.

This Court there said:

> "It (that the Legislature shall ascertain the proportion as soon as may be practicable, and provide for the liquidation thereof) was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be and an indication of the way." (Page 30.)

It is clearly within the power of the Court to compel the Legislature of West Virginia, in conformity with this constitutional requirement, to make provision for the payment of the decree and judgment, which represent the ascertained equitable proportion of the Virginia debt assumed by West Virginia.

It is said by our adversaries (page 20) that the prayer of the mandamus that the Legislature shall "assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment * * * unless the Legislature shall * * * make provision for the payment of said judg-

ment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash, * * * not only illustrates, but actually invokes the discretion of the Legislature and does not at that embody all of its discretionary power when measured by the constitutional provision invoked."

There is a vast difference between a discretion to do or not to do a particular act, with no compulsion to do one thing or the other, and a discretion to do one of two things, with a duty to select.

Should the Legislature of West Virginia see fit to raise the money by creating a bonded indebtedness, and with the proceeds, paying the debt, it may thus save the necessity of a large immediate levy.

Its primary duty, however, is to pay the debt, and the only discretion conferred upon it is to determine whether it will pay it by exercising one power or another. Its duty is to exercise a power which will force payment.

The issue raised by West Virginia as to the judicial power to use an ordinary judicial remedy to enforce a judical decree, is most momentous. The question, however, seems to us, though we state the fact most respectfully, one not difficult of solution.

The matter of eompelling a State to do its duty is a judicial one. As such, it has been expressly conferred upon this Court. The duty of the State of West Virginia is to liquidate the decree. It can do this by the exercise, by its Legislature, of its power to levy a tax. This power, so far as regards this Court, and its decree, is a duty. The remedy

by which the duty can be compelled to be performed is an ordinary judicial remedy.

Respectfully submitted,

JOHN GARLAND POLLARD,
Attorney General of Virginia.

WM. A. ANDERSON,
RANDOLPH HARRISON,
JOHN G. JOHNSON,
SANFORD ROBINSON,
Of Counsel.

March 15, 1917.

(4520X)

Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia, Defendants.

WEST VIRGINIA'S BRIEF IN SUPPORT OF HER MOTION TO DISCHARGE THE RULE IN MANDAMUS HEREIN.

E. T. ENGLAND,
Attorney General of West Virginia.
JOHN H. HOLT,
Special Counsel for State of West Virginia.

March 5, 1917.

Supreme of Court the United States

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STATEMENT OF CASE.

On the 14th day of June, 1915, this Court, in the exercise of its original jurisdiction under Sec. 2 of Art. 3 of the Constitution, entered a judgment in favor of the Commonwealth of Virginia against the State of West Virginia for the sum of $12,393,929.50, with interest thereon from July 1, 1915, until paid at the rate of 5% per annum.

On June 5, 1916, the Commonwealth of Virginia, after notice given, moved for a writ of execution

upon said judgment; but the writ was denied, upon the ground that the application therefor was premature, in consequence of the fact that the Legislature of the State of West Virginia had not met since the rendition of the judgment, and it had had no opportunity to provide for the payment of the debt.

Commonwealth of Virginia v. State of West Virginia, 241 U. S., 531.

Subsequently, that is to say, upon the 10th day of January, 1917, the West Virginia Legislature convened in regular biennial session, and, while still in session, and before the adjournment thereof, the Commonwealth of Virginia applied for and obtained leave to file a petition for a writ of mandamus against the State of West Virginia and the individual members of both branches of her Legislature, commanding the Legislature of said State to provide for the payment of said judgment by a levy of taxes or through the medium of a bond issue.

The petition was received, and, on the 5th of February, 1917, a rule in mandamus was issued, commanding the Honorable Wells Goodykoontz, President of the West Virginia Senate, and the other members of that body, as well as the Honorable Joseph S. Thurmond, Speaker of the House of Delegates of the State of West Virginia, and the other members of that House, to show cause before this Court on the 6th day of March, 1917, "why a writ of mandamus should not issue against them as prayed in said petition".

The rule was served upon the individual members of the Legislature upon the 23rd day of February, 1917, and, by a joint resolution on that day

passed, the Attorney General of the State and special counsel were authorized and directed to appear and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof and the several Senators and Delegates constituting the membership of said Legislature.

Upon the return day of the rule, and pursuant to the resolution aforesaid, the Attorney General of the State and special counsel retained for the purpose appeared on behalf of the respondents, and filed a motion to discharge the rule.

GROUNDS OF THE MOTION TO DISCHARGE.

The grounds of the motion to discharge are assigned as follows:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.

4. It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.

5. Sec. 8 of Art. 8 of the West Virginia Constitution of 1863 imposed no ministerial duties upon the Legislature of the State, but only judicial and legislative duties.

6. Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.

ARGUMENT.

1. *A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.*

That Amendment reads:

> "10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

The power of laying taxes for State purposes has not been "delegated to the United States by the Constitution, nor prohibited by it to the States", and, in

consequence, this power has been "reserved to the States". It was never contemplated that the States would lay levies for national purposes, or that the Federal Government would lay them for State purposes. On the contrary, we have, under the Constitution, two distinct powers of taxation, the one for federal, and the other for State purposes; and it is exercised, in the one case, exclusively by the federal government, and, in the other, by the State. Neither may encroach upon the other, but each must turn upon its own separate axis, and revolve in its particular orbit. Otherwise, there would be an irreconcilable conflict between an indestructible Union, upon the one hand, and equally indestructible States, upon the other. It is true that one State may not destroy the Union, but it is equally true that the Union may not destroy one State. In addition to this, the power of taxation in each government is lodged in the legislative department thereof, and may not be exercised by the judicial department of either government, or in any case.

What, then, is the character and the purpose of the particular tax that it would be sought to levy by the writ of mandamus prayed? Clearly it is a State tax, to be devoted exclusively to a State purpose; that is to say, to the payment of a State debt, and is such a tax as may be authorized, in consequence of the Tenth amendment, only by the State government. It involves one of the expressly reserved sovereignties of the State, and this express reservation may not be overturned by an antecedent implication that the power to decide necessarily embraces the power to execute. The conclusion, therefore, would seem to be irresistible that the Federal Government cannot,

through its judicial or any other department, coerce a State in the exercise of its reserved powers by compelling the legislature thereof to exercise such powers contrary to its discretion, and in opposition to its will. The existence and exercise of such a power would overturn the Tenth Amendment, and make serious inroads upon the fundamental rights of the States. In other words, the provision contained in Sec. 2 of Article III, of the Constitution, giving the Supreme Court original jurisdiction "in all cases * * * in which a State shall be a party", if it should have added to it, by inference or argument, and as an incident to such jurisdiction, the power to enforce a judgment rendered in any such case through the medium of a writ of mandamus controlling the legislative action of a State in respect to its reserved powers, would render the subsequently adopted Tenth Amendment abortive.

In the case of South Dakota v. North Carolina, 192 U. S., 286 (48 L. ed., 448), Mr. Justice Brewer, in delivering the majority opinion of the Court, speaks of "the absolute inability of a court to compel a levy of taxes by the legislature": and the foregoing conclusion is further strengthened by the opinions of this Court, speaking through Mr. Justice Miller, in the cases of Heine v. Board of Levee Comrs., 19 Wall., 655, and Rees v. Watertown, 19 Wall., 107. In the first case, he makes use of the following language:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In

the case before us, the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the Court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

And, in the second, he says:

"We are of the opinion that this Court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only, and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

To like effect is the case of Meriwether v. Garrett, 102 U. S., 472, decided by this Court in 1880, wherein Mr. Justice Field, in delivering a concurring opinion for himself, Mr. Justice Miller and Mr. Justice Bradley, made use of the following language:

> "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.
>
> It is the province of the Courts to decide causes between parties, and, in so doing, to construe the Constitution and the Statutes of the United States and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department

within its own proper sphere was designed by the founders of our government, and is essential to its successful administration."

Page 515.

Continuing, he further says:

"These authorities, and many others to the same purport might be cited, are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it.

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the Legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been obolished and the power withdrawn, the remedy of the creditors is by an appeal to the Legislature, which alone can give them relief. No Federal Court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal Court, it cannot seize the power which belongs to the leg-

islative department of the State and wield it in their behalf."

Pages 517 & 518.

The reasoning of this Court in *ex parte* Kentucky v. Dennison, 24 How., 66; 16 L.ed., 717, is analogous. There paragraph two of Sec. 2 of Art. IV. of the Federal Constitution, requiring the executive authority of one State to deliver up on demand fugitives from justice, and the Act of Congress of 1793, providing the regulations necessary to the execution of such constitutional provision, were construed, and the extent of their force defined. One Willis Lago, indicted in the State of Kentucky for a crime under the laws of that State, fled into the State of Ohio, and a requisition issued by the Governor of Kentucky, under the constitutional provision and Act of Congress aforesaid, upon the Governor of Ohio for his return was denied. Thereupon, the State of Kentucky instituted a mandamus proceeding in the Supreme Court of the United States against the Governor of Ohio, asking that the latter be compelled to obey the requisition; and, although this Court assumed jurisdiction, and held that mandamus was the proper proceeding, if there were any remedy at all applicable to the controversy, it denied the writ, upon the ground that the constitutional provision and the Act of Congress aforesaid only appealed to the moral duty and fidelity of the States, and did not provide "any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms

the Government of the United States with this power"; and Mr. Chief Justice Taney, who delivered the opinion of the Court, concluded the same with the following language:

> "And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty'.
>
> But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him.
>
> And upon this ground the motion for the mandamus must be overruled."

See also Carter v. State, 42 La. Ann., 927; 21 Am. St. Rep. 404.

2. *The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.*

Jurisdiction to hear and determine may, and does ordinarily, include the power to enforce (or rather the power to issue proper writs for the enforcement of a judgment); but mandamus cannot, under the Constitution, become a substitute for a writ of execution upon a judgment against a State. Execution may be issued upon a judgment regularly rendered against a State, and be levied upon any property owned by the State, and not devoted to political or governmental purposes, and, if no such property be found, the writ must be returned *nulla bona*, and the end of the law has been reached, because, as we have seen, the legislative department of a State may not be coerced, under the Constitution; and there is nothing remarkable in this situation, because frequently judgments are rendered and executions issued thereon which are returned *nulla bona*, and all legal remedies thereby exhausted. The Courts can only give suitors the proper process, original and final, and, if these fail to satisfy the creditor's claim, there is no fault in the judiciary. In other words, jurisdiction does not include or imply the collection or satisfaction of a debt, but only means the power to hear and determine, and to render judgment therefor and issue proper process thereon.

The cases cited by counsel for Virginia at page three of their brief (Supervisors v. U. S. etc.) are beside the question, do not meet the situation, and throw no light whatever upon it. We will notice each briefly.

In the case of Supervisors v. U. S., 4 Wall., 435; 18 L.ed., 419, the County of Rock Island, in the State of Illinois, pursuant to the authority of the Legisla-

ture of that State, subscribed for stock in the Warsaw & Rockford R. R. Co., and issued and negotiated in payment thereof certain coupon bonds of the County. The earlier coupons were paid, but the County finally defaulted. Thereupon, the holder of the bonds instituted an action in the Circuit Court of the United States for the Northern District of Illinois upon the overdue and unpaid coupons, and recovered a judgment for $2,554.60 and costs The County failed and declined to pay this judgment, and mandamus was resorted to by the judgment creditor to compel the County Supervisors, under the Illinois statute, to levy a tax for its satisfaction. The Circuit Court in regular course awarded a peremptory writ of mandamus, and to this judgment the County Supervisors prosecuted a writ of error to the Supreme Court. The contention here was that the Act of the Legislature of the State of Illinois of February 16, 1863, authorizing the Board of Supervisors in such Counties as might owe debts which their current revenue was insufficient to meet to levy a tax for the purpose of liquidating such indebtedness, conferred only a discretionary power upon the Supervisors, which could not be controlled by mandamus; but this Court held that the statute was mandatory, and, in consequence, affirmed the judgment in mandamus of the Court below. In other words, the State was not a party, and the writ was not directed to the Legislature thereof. Indeed, the Legislature had already acted. It had authorized the issuance of the bonds and the levy of a tax for their payment, and had appointed the County Supervisors as its agents for the execution of its mandates.

Under such circumstances, there was no invasion of sovereignty, or coercion of legislative action. On the contrary, it was the enforcement of ministerial acts already authorized and directed by legislative authority.

Von Hoffman v. City of Quincy, 4 Wall., 535; 18 L.ed., 403, simply presents a case where a municipality, under the authority of the legislature, issued bonds, with the power of local taxation necessary to pay the same, and, after the indebtedness had been so incurred, the legislature, by subsequent action, undertook to repeal its former law, thereby impairing the obligation of a contract, which it was held it could not do under the Constitution, and mandamus went to its county agents compelling them to levy the necessary tax to pay the bonds issued under the original law.

The City of Galena v. Am, 5 Wall., 705; 18 L.ed., 560, practically decides both questions involved in the two preceding cases, viz., that an Act authorizing a municipality to levy an annual tax to be paid on its debt is imperative, and that bonds once issued under the authority and direction of a legislative enactment may not be impaired by a subsequent repeal of that Act. Here again, as before, the Legislature had acted, and had named the agents for the execution of what it had authorized, and these agents were subject to mandamus compelling them to perform their imperative ministerial duties.

Riggs v. Johnson County, 6 Wall., 166; 18 L.ed., 768, was likewise an application to the Circuit Court of the United States for a mandamus to compel the supervisors of Johnson County, Iowa, to levy a tax

for the payment of a judgment rendered by the Circuit Court against said County on account of overdue and unpaid interest on certain of its bonds theretofore issued in aid of railroad construction under certain Acts of the State Legislature, which mandamus was refused by the Circuit Court; but its judgment was reversed upon writ of error by this Court, and the writ directed. The same principles were applied as in the preceding cases, and there was nothing new for consideratiton, except the County made return to the alternative writ that it had been enjoined by the State Court from levying the tax in question, and would be in contempt if it were to do so under mandate from the Federal Court. This was held to be no defense. Again the State was not a party, and its Legislature was neither requested nor compelled to do anything. It had already acted, and the judgment of this Court simply operated upon the State's agents, and required them to perform certain mandatory duties previously laid upon them by legislative action. Walkley v. City of Muscatine, 6 Wall., 481; 18 L.ed., 930, simply holds that in cases like the above, and after a return of *nulla bona*, a bill in equity will not lie to compel the levying of a tax for the payment of a judgment, but that mandamus is the proper remedy. The decision has nothing to do with the present controversy.

Labette County Comrs. v. Moulton, 112 U. S., 217; 28 L. ed., 698, is to the same effect.

3. *Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.*

At common law, Parliament never was, and could not be, coerced by the writ of mandamus.

People v. Morton, 156 N. Y., 136.

And, in this country, the same principles and usages have always obtained.

Ex parte Echols, 39 Ala., 698.
State v. Bolte, 151 Mo., 362.

Certainly such is true with respect to the mandamus of State Legislatures by State Courts, and there is no case on record where this Court has ever addressed a writ of this character to the law-making power of a State.

4. *It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.*

We are not unmindful of the dangers and difficulties of analogy; but, if this were the case of an individual judgment debtor, it is plain that, after a writ of excution had gone against him and been returned *nulla bona*, and after it had been ascertained, in addition thereto, that he had no real estate out of which to satisfy the judgment, although he might have great earning capacity, no one would contend that the exercise thereof might be compelled by the

writ of mandamus. He might be able to sing or dance, and even be bound by contract to do both, and yet he would not be compelled to do either.

Lumley v. Wagner, 1 De G., M. & G., 604.

It may be answered that a fund was created by mandamus for the payment of a debt in the case of Supervisors v. U. S., 4 Wall., 435, *supra*, and like cases hereinbefore reviewed; but it will be observed that in each of those cases all necessary legislative action had theretofore been had, and the proper ministerial agents appointed for the effectuation thereof; so that nothing was left to be done except to have resort either to the State or Federal Courts (for both had jurisdiction in the cases referred to) for a writ of mandamus to compel the performance of a purely ministerial act; made mandatory by the act of the only branch of government having any discretion in the premises.

5. *Sec. 8 of Art. 8 of the West Virginia Constitution of 1863 imposed no ministerial duties upon the Legislature of the State, but only judicial and legislative duties.*

This constitutional provision reads as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand, eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same

> as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

And the contention of Virginia is that, by reason of these terms, "the Legislature of West Virginia is under an express constitutional obligation to provide for the payment of the amount ascertained by the Court to be due by West Virginia * * *," and that "it is clearly within the power of the Court to compel the Legislature of West Virginia, in conformity with this constitutional requirement, to make provision for the payment of the decree and judgment, which represent the ascertained equitable proportion of the Virginia debt assumed by West Virginia" (brief of counsel for relator, pages 7 & 8).

But it would seem that that portion of the constitutional provision declaring that "the Legislature shall ascertain the same" (the equitable proportion of the debt to be paid) "as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years" is no part of the contract. Otherwise, this Court would have had no jurisdiction to ascertain West Virginia's equitable proportion of the debt, because, if effect were given to the portion of the constitutional provision relied upon, the West Virginia Legislature would have had the exclusive right to ascertain such amount; but this Court has held otherwise. It says in the case of Virginia v. West Vir-

ginia, 220 U. S., page 1, that —

> "The provision in the Constitution of the State of West Virginia that the Legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouth-piece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be, and an indication of the way."

Certain it is that one-half of the constitutional provision last quoted has been stricken from the contract, and the power to ascertain the amount taken out of the hands of the Legislature and assumed by the Court, and that too for the reaso that, "apart from the language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in no wise beyond the competence of a tribunal to decide." And, if that be true, the residue of the provision, even if it should be permitted to stand and be given full force, would be left as a legislative function, over which the judiciary would have no control.

We come right back, therefore, to the question whether or not this Court can or will interfere by mandamus to coerce the action of a State Legisla ture in the performance of purely legislative func tions within its exclusive jurisdiction, and this, it is submitted, this Court will not do, for the same reason, among others, that it refused in the case of

Louisiana v. Jumel, 107 U. S., 711; 27 L. ed., 448, to oust the political power of the State of Louisiana of its jurisdiction, and set the judiciary in its place; and it is no answer to say that the present case is distinguishable from that of United States v. Jumel, in that there the State made no appearance, while West Virginia has here appeared and submitted herself to the jurisdiction; because wherever jurisdiction is conferred and process is regularly issued and served, as in this case, it makes no difference whether the defendant appears or not, because the defendant is before the Court anyhow, and a judgment by default could be rendered, which would be just as binding as one upon appearance. The appearance, in other words, has nothing to do in the case of a State by way of giving consent to be sued, because that consent was given long ago by the adoption of the Federal Constitution in 1789.

It should be further observed in this connection and as bearing upon the constitutional provision referred to, that the petition prays for a mandamus commanding "the Legislature to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment * * * * unless the Legislature shall * * * make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash." This not only illustrates but actually invokes, the discretion of the Legislature, and does not at that embody all of its discretionary power when measured by the constitutional provision invoked. The Legislature could perhaps

under the State Constitution, either (1) lay a tax upon all property, real and personal, within the State, to be collected at once, sufficient to pay the judgment, or (2) it might, under that Constitution distribute the tax over a period of years, or (3) it might resort to a bond issue, which would be governed either by Sec. 8 of Art. 8 of the Constitution of 1863, or by Sec. 4 of Art. 10 of the present Constitution, which reads as follows:

> "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

If under the former, a sinking fund would have to be provided "sufficient to pay the accruing interest and redeem the principal within thirty-four years"; that is to say, the period of payment might be short or long, either one year or thirty-four, within the discretion of the Legislature. And if under the latter, payment would have to be "equally distributed over a period of at least twenty years"; that is to say, the annual contributions to the sinking fund would have to be equal for a period of twenty years or more, again at the discretion of the Legislature.

In any event, the wide discretion of the Legislature is illustrated; and it should be further borne in

mind that that body is composed of two Houses, one of which might deem its discretionary duty to lie in one direction, and the other in another direction, and yet the two must concur in order to lay a levy or issue bonds.

If these things be true, the discretion of the Legislature becomes apparent, and that discretion will not be controlled by mandamus.

6. *Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.*

While the writ of mandamus is no longer prerogative, yet it is highly extraordinary, and its issuance is at the sound discretion of the Court.

Re Key, 189 U. S., 85.
Life & Fire Ins. Co. of N. Y. v. Wilson, 8 Peters, 291; 8 L. ed., 949.
State v. Buchanan, 24 W. Va., 362.
State v. Melton, 62 W. Va., 253.
Cyc., Vol. 26, pages 143-6.

The matter set up in the return of the respondents relative to the cession of the northwest territory is an appeal to this Court to exercise its discretion against the issuance of the writ herein, under all the circumstances.

Respectfully submitted,

E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.

Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia.

MOTION OF WEST VIRGINIA AND OTHER RESPONDENTS TO DISCHARGE THE RULE IN MANDAMUS HEREIN.

Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia.

MOTION TO DISCHARGE AND RETURN TO THE RULE ISSUED HEREIN ON THE 5TH DAY OF FEBRUARY, 1917, ORDERING THAT CAUSE BE SHOWN ON THE 6TH OF MARCH, 1917, BY THE RESPONDENTS WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE AGAINST THEM AS PRAYED IN THE PETITION OF THE RELATOR.

And now come the respondents, the State of West Virginia and Wells Goodykoontz, President of the West Virginia Senate, et al., being all the mem-

bers of said Senate, and Joseph S. Thurmond, Speaker of the House of Delegates of the State of West Virginia, et al., being all the members of said House of Delegates, and move to quash the rule awarded against them at the prayer of the Commonwealth of Virginia upon the 5th day of February, 1917, ordering them to show cause before this Court on the 6th day of March, 1917, why a writ of mandamus should not issue against them as prayed, and assign as grounds of said motion the following:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.

4. It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and

subject property already in existence for that purpose.

And now, by leave of Court, these respondents, without waiving their motion to discharge said rule, or any of the grounds assigned in support thereof, make further return thereunto as follows:

I. They deny, as charged in the tenth paragraph of the petition of the relator, that it was the absolute ministerial duty of the Legislature of the State of West Virginia, and of the members of her Senate and House of Delegates, upon the convening of said Legislature on January 10, 1917, to take the necessary steps and make the necessary enactments providing for the payment of the judgment in favor of the State of Virginia against the State of West Virginia, and described in said petition. On the contrary, they say that their duties in the premises, and under the 8th Section of the 8th Article of the Constitution of West Virginia of 1863, were, and are, not ministerial, but legislative, deliverative and discretionary; and they further say that, instead of omitting or neglecting their duty as charged in the petition, upon the convening of the Legislature on January tenth, or shortly thereafter, the Senate and House of Delegates, each for itself, appointed a committee, with authority to hear arguments, report upon resolutions and recommend appropriate measures looking to the settlement of the judgment rendered at the suit of Virginia against West Virginia, which committees were ready to begin their sittings and to enter upon their work at the time of the presentation of the petition of the relator to

this Court; but that since said time, and in consequence of said petition and the rule ordered thereon upon the 5th day of February, 1917, all matters relating to the settlement of said judgment have been suspended and held in abeyance, except that, on the 21st day of February, a joint resolution was adopted by both houses of the Legislature, directing the Attorney General of the State and associate counsel to make appearance and defense, in the name and on behalf of the State of West Virginia and the Several members constituting the Senate and House of Delegates thereof, to the rule in mandamus issued herein; and said resolution further provided that, in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon said rule, whether its judgment be for or against the State of West Virginia, the Governor is requested to convene the Legislature in special session as soon as may be for the purpose of doing without delay what should be done in the premises.

A copy of said resolution is filed herewith as a part hereof.

II. Further answering, these respondents say that they are advised that the writ of mandamus is a discretionary writ, and that this Court will exercise its discretion against the issuance thereof if to issue the same would give an undue advantage to the relator, or operate unjustly against the respondents; and they say that it should not be issued in this case for the following reasons:

These respondents are informed and believe, and upon such information and belief say, that the

State of Virginia has a claim against the Government of the United States for many millions of dollars, which should be collected, and, when collected, that the State of West Virginia should participate therein in the same ratio that she, the State of West Virginia, is compelled by the judgment of this Court to contribute to the payment of Virginia's *ante bellum* debt; that is to say, she should be paid out of said claim by the State of Virginia 23½% thereof.

And they further say that they are advised that the State of Virginia alone can take steps for the collection of said claim, and are informed that Virginia has taken no such steps, but has to the present time withheld, and still withholds, from any effort to reduce this common asset to possession, and yet seeks to compel the State of West Virginia to pay her proportion of the common debt, and thus denies her the opportunty to share in the common assets.

They further say that the equity aforesaid was not passed upon by this Court in the settlement of the controversy between Virginia and West Virginia, and could not have been, because the United States was not a party thereto, and could not have been, but that the State of Virginia could have theretofore impleaded the United States in the Court of Claims upon the claim aforesaid, and reduced the same to possession, so that West Virginia could have asserted, and this Court could have allowed, her right to participation therein, but she did not, but then failed and refused, and still fails and refuses, so to do.

These respondents further say that the origin,

nature and history of the claim aforesaid is as follows:

Prior to the adoption of the articles of confederation entered into by the thirteen original States, Maryland refused to sign the same, unless and until those States holding western territory should surrender the same to the United States. The State of Virginia at the time laid claim to all that territory lying northwest of the Ohio River out of which the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota have since been formed; and, by an Act of her General Assembly passed at a session commencing on the 20th day of October, 1783, and for the purpose of expediting the establishment of the proposed confederation, authorized her delegates in Congress to convey to the United States in Congress assembled all her territory northwestward of the Ohio River, and, on the first day of March, 1784, her delegates in Congress, consisting of Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, and pursuant to the Act of October 20, 1783, presented a deed to Congress ceding all the territory of Virginia northwestward of the Ohio River to the United States, upon certain terms, conditions and trusts therein set forth, which deed of cession was accepted according to its terms, and directed to be recorded and enrolled among the Acts of the United States in Congress assembled. Among the conditions set out in the deed and accepted by Congress was the following:

> "(F) That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to,

> any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It further appears from the requisitions made by Congress upon the thirteen States at the time of this cession that Virginia's "usual respective proportion in the general charge and expenditures" was about one-seventh of the whole; and it seems to be also conceded that the moneys derived from the sale of the lands embraced in this cession were to be applied to the extinguishment of the public debt incurred in the War of the Revolution, which debt was finally paid; so that, after this part of the trust had been met, and certain other conditions of the deed had been performed, the residue of the trust fund should have been applied to the reserved interests of the States set forth in Article (F) of the deed, Virginia included, and to "no other use or purpose whatsoever." Instead of doing this, however, Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms.

The total acreage embraced, according to gov-

ernment surveys, in the cession amounted to 170,208,613 acres, and out of this Congress seems to have donated to local uses, contrary to the deed, 38,864,189 acres, which, valued at $2 per acre, the price fixed by Congress when these lands were offered for sale by the Act of May 18, 1796, would amount to $77,728,378. In addition to this, proceeds of the sales of lands amounting to $2,953,654.70 were likewise donated to local uses, making an aggregate of donations contrary to the deed of $80,682,032.70.

In addition to this, their information is that the trust has not even yet been entirely administered, but that there remains on hand undisposed of several thousand acres of these lands; and, not adding the value of these to the value of the local donations above ascertained, and allowing unto Virginia one-seventh thereof as her residuary interest in the trust, there would be due and payable from the Government of the United States to the State of Virginia the sum, at the least, of $12,000,000, in which West Virginia should share in the same ratio that she is compelled to contribute to the payment of Virginia's debt; that is to say, she should receive 23½% thereof.

The foregoing epitome of said claim is based upon information and belief, and, in support thereof, a copy of the message of Governor Swanson of Virginia to the General Assembly of that State, and dated January 24, 1910, is exhibited herewith as a part of this return.

WHEREFORE, said respondents, and each of them, pray that said rule may be discharged, and the peremptory writ of mandamus denied.

STATE OF WEST VIRGINIA,
Wells Goodykoontz, Pres. W. Va. Senate,
Benj. L. Rosenbloom, Senator,
Elmer Hough, "
W. H. Carter, "
W. F. Burgess, "
Robert L. Gregory, "
M. K. Duty, "
Warren Miller, "
Raymond Dodson, "
W. P. McAboy, "
J. E. Frazier, "
J. W. Luther, "
W. P. Hawley, "
C. C. Coalter, "
Martin V. Godbey, "
A. R. Montgomery, "
Gory Hogg, "
H. G. Vencill, "
E. H. Morton, "
Fred L. Fox, "
Scott C. Lowe, "
Chas. A. Sinsel, "
Roy E. Parrish, "
Wallace B. Gribble, "
Richard E. Talbott, "
Gohen C. Arnold, "
S. O. Billings, "
S. L. Cobun, "
Frank Beckwith, "
G. K. Kump, "

Joseph S. Thurmond, Speaker House of Delegates of W. Va.,
Clyde Poling, Member House Delegates,
Harry P. Henshaw, "
John N. Parks, "
Luther R. Jones, "
Lee Rader, "

L. T. Harvey, Member House Delegates,
T. J. Mahan, "
W. C. W. Renshaw, "
John L. Connor, "
A. J. Baxter, "
W. N. Clay, "
Kenna Lester, "
Paul Hardman, "
A. K. Fleming, "
J. Alfred Taylor, "
Charles J. Massau, "
Geo. H. Scaggs, "
J. Wilbur Davis, "
E. E. Cottrell, "
P. A. Dixon, "
A. B. C. Bray, "
W. W. Carder, "
J. Ness Porter, "
J. D. Chipley, "
S. R. Harrison, Jr., "
John Moore, "
George W. Sturm, "
Louis A. Johnson, "
Kenna Casto, "
Everett Hughes, "
Milton Burr, "
L. V. Koontz, "
J. F. Bouchelle, "
Angus W. McDonald, "
John Patrick, "
O. F. Payne, "
A. W. Price, "
James Bassel, "
Charles Cabell, "
Robert Bland, "
Ira A. Akins, "
Frank C. Haymond, "
E. O. Murray, "
C. H. Hunter, "

George W. Byrnes, Member House Delegates,
Pat. M. Wilson, "
W. D. Curry, "
R. B. Ferguson, "
W. B. Honaker, "
A. F. Wysong, "
S. N. Moore, "
Joseph B. Straton, "
Wm. S. John, "
Perry C. McBee, "
Clarence Symns, "
W. H. Somers, "
Harvey Hagerman, "
E. Howard Harper, "
J. Buell Swope, "
Floyd Waldron, "
W. G. Graves, "
J. E. Emsley, "
W. T. Otto, "
Harry A. Weiss, "
N. Price Whitaker, "
G. A. Hiner, "
Gilbert D. Smith, "
B. M. Yeager, "
W. H. Glover, "
Leroy Shaw, "
C. W. Taylor, "
C. L. Heaberlin, "
V. E. Sullivan, "
E. H. Arnold, "
James W. Weir, "
B. R. Twyman, "
A. M. Hersman, "
G. T. Sarver, "
A. A. Riddlebarger, "
J. Sidney Burdett, "
H. R. Werner, "
F. R. Hickman, "
John B. Hilleary, "

W. K. Ferguson, "
F. W. Terrill, "
W. T. Talbott, "
Septimus Hall, "
J. Friend Alley, "
S. F. Wells, "
W. D. Price, "
P. F. Wells, "
John D. Sweeney, "
A. J. Mullens, "

By E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.

DISTRICT OF COLUMBIA, to-wit:

Joseph S. Miller, being duly sworn, says that he is a member of the "New Virginia Debt Commission" of the State of West Virginia, charged under the law of said State with the defense of this proceeding, and that he has read and is familiar with the allegations of the foregoing return, and that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information he believes them to be true.

_____

Taken, subscribed and sworn to before me this _____day of March, 1917.

_____,

_____.

WEST VIRGINIA LEGISLATURE.

SENATE JOURNAL

REGULAR SESSION, 1917.

Charleston, W. Va.,
Wednesday, February 21, 1917.

Mr. Miller offered the following:

SENATE JOINT RESOLUTION No. 20.—

"WHEREAS, The Supreme Court of the United States, at the suit of the Commonwealth of Virginia vs. the State of West Virginia, on June 14, 1915, entered a judgment in favor of the Commonwealth of Virginia against the State of West Virginia for $12,393,929.50 with interest thereon from July 1, 1915, until paid, at the rate of 5 per cent. per annum, and

WHEREAS, The Senate and the House of Delegates has each for itself, at the first regular session of the Legislature which convened after the rendition of said judgment, appointed a committee with authority to hear arguments, pass upon resolutions and recommend appropriate measures looking to a settlement of the judgment aforesaid, and

WHEREAS, The Commonwealth of Virginia, not content to await the action of the Legislature in the premises, has seen fit to appear before the Supreme Court and sue out a rule in mandamus directed to the entire membership of each branch of the Legislature, requiring the members thereof

forthwith and at the present session, to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment, with interest thereon until paid, or make provision for the payment thereof by an issue of bonds, or else to appear at the bar of the Supreme Court on the 6th day of March next, and show cause why such action should not be taken, and

WHEREAS, This Legislature upon the challenge of its constitutional rights thus made by the Commonwealth of Virginia and upon the advice of the Attorney General and special counsel duly appointed by the New Virginia Debt Commission, authorized and empowered so to do, feels that it should suspend further action and leave the further consideration of the Virginia Debt in abeyance until the Supreme Court shall have disposed of said mandamus proceeding, and that it should defend against said rule; be it, therefore

RESOLVED BY THE SENATE, THE HOUSE OF DELEGATES CONCURRING THEREIN:

FIRST,—That the Attorney General of the State, with the assistance of special counsel retained by the New Virginia Debt Commission for the purpose, be authorized and directed to appear to and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof, and the several senators and delegates constituting the membership of its respective bodies.

SECOND,—That in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon the mandamus, the

Governor is requested, whether that judgment be for or against the State of West Virginia, to convene the Legislature in special session, as soon as may be, for the purpose of doing without delay what should be done in the premises."

On motion of Mr. Miller, the rules were suspended and the resolution was taken up for immediate consideration, read by the Clerk, and adopted.

SENATE DOC. No. III.

COMMUNICATION

from the

GOVERNOR OF VIRGINIA

transmitting

CERTAIN CORRESPONDENCE AND REPORTS IN REFERENCE TO THE CLAIM OF VIRGINIA AGAINST THE UNITED STATES GOVERNMENT ON ACCOUNT OF THE CESSION OF THE NORTHWEST TERRITORY.

COMMONWEALTH OF VIRGINIA,

GOVERNOR'S OFFICE,

Richmond, Va., January 24, 1910.

TO THE GENERAL ASSEMBLY OF VIRGINIA:

Superintendent of Public Instruction Hon. J. D. Eggleston, and Dr. Robert B. Fulton, superintendent of the Miller School, have called to my attention

a large claim which the State of Virginia has against the Federal government arising from the cession to the United States of the vast territory once possessed by this Commonwealth north of the Ohio river. Dr. Fulton has, at the request of Superintendent Eggleston and myself, for some time been making a thorough investigation of this matter, and has compiled a complete and detailed statement of this claim, which appears to establish its justice and legality, and imposes upon me the duty of transmitting the facts and information obtained by him to you for consideration and action.

Prominent Virginians, including Commodore Maury and Superintendent of Public Instruction Dr. William H. Ruffner, have presented in writings and reports this claim of the State of Virginia.

Succinctly stated the claim presented is as follows:

The vast territory north of the Ohio was included in Virginia's original charter of 1609, which charter was prior to the charter of any other State, and which territory was included in the boundaries of Virginia when she asserted her independence and organized her government as a sovereign state in 1776. This territory, in addition to being Virginia's by charter rights, became hers also by conquest, since it was conquered from the British by Virginia troops, commissioned by the Governor and Council of Virginia. The expenses incurred by these troops in this conquest were paid out of the treasury of this Commonwealth. Virginia was in actual possession and control of this territory until her cession to the Federal government and the ac-

ceptance of her cession by the Federal government. Prior to this cession this territory was organized as the county of Illinois, and held as a part of the State. Thus, by charter rights, by conquest and by actual possession, this territory ceded constituted a part of Virginia. The fact that the United States government derived title to this vast territory by cession and deed of conveyance made by Virginia to the United States government has been clearly and distinctly recognized by the Supreme Court of the United States in the case of HANDLEY'S LESSEE v. ANTHONY, 5th Wheaton, page 374. In this case, the opinion of which was rendered by Chief Justice Marshall, the court decided, in fixing the boundary lines between the State of Kentucky and the State of Indiana, that the boundary line of Indiana must be determined by the cession made by the State of Virginia to the United States Government and the terms and limitations contained in that cession, since the title of the United States to the territory was derived from this cession of the State of Virginia. The opinion of this court was further sustained by the General Court of Virginia in the case of COMMONWEALTH v. GARNER, 3d Grattan, page 655. Thus the prior rights of Virginia to this territory have been judicially determined.

In the act of Virginia making the cession of this large territory to the United States and in the deed of conveyance in pursuance of the act of the General Assembly executed by her representatives in the Continental Congress, Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, according to her directions, were contained certain conditions,

which conditions the Federal Government accepted. Among the conditions thus enumerated and accepted by the Federal government was the following:

> "That all the land within the territory so ceded to the United States and not reserved or appropriated to any of the before mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation or Federal Alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose and for no other use or purpose whatsoever."

The United States government, through Congress, has uniformly recognized that this territory ceded was derived from Virginia, and that she was bound by the conditions contained in the act of cession. Desirous of changing some of the conditions contained in the act of cession regarding the establishment of new States in the ceded territory, she requested Virginia to make some alterations in these conditions, which Virginia consented to, permitting the creation of States different from the original cession. By requesting Virginia to make this change Congress recognized that she had no right even in the creation of States in this territory to alter the terms of the original act of conveyance without the

consent of the State of Virginia.

Out of this territory ceded by Virginia were formed the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota. The United States received by this cession 170,208,623 acres of land. Of this land some was appropriated to comply with the conditions contained in the act of cession accepted, other than the one above stated. The largest portion of it was sold and paid into the treasury of the United States and used in payment of the public debt and in the payment of Federal expenditures. It may possibly be contended that this portion was, under the terms of the cession used for the benefit of all States, as contained in the cession made by Virginia. But, contrary to the expressed conditions contained in the act of cession, Congress at different times, in the aggregate, appropriated 38,868,212 acres of land, and $2,953,654.70, derived from the sale of these public lands, entirely to local uses within these six states. These amounts of land and money were appropriated for local school purposes, construction of canals, improvement of local roads and other purposes within these States, entirely local. Thus it appears that more than one-fifth of the lands ceded by Virginia under definite provisions and conditions, reserving to Virginia an interest in them, has been disposed of in ways that have given no "use and benefit" to Virginia, as distinctly reserved for her in her act of cession. At the time that Virginia ceded her western territory to the United States, Virginia's proportion in the general charge and expenditure was about one-seventh of the whole, and thus her reserved interest in the lands not specifically applied for the purposes stated in

the deed of concession was about one-seventh. The value of this land donated to local uses (amounting to 38,868,212 acres), computed at $2.00 per acre, which was the price fixed by Congress when it was first offered for sale, would be $77,736,424.00. This, added to the amount of money appropriated of $2,958,654.00, would make the total value of the donation for local purposes, clearly contrary to the terms and provisions of cession, amount to $80,695,078.00. Subject to such claims as might exist in behalf of Kentucky and West Virginia, which were then a part of Virginia, Virginia has a right to demand of the Federal government her part of these lands and money, which Congress appropriated entirely to local uses and for which Virginia received no benefit.

The full statement of Dr. Fulton, which I file with this message, indicates other large and fair claims of Virginia, which the limit necessarily given to this message precludes me from mentioning. Though reserving to herself a fair share of the use and benefits to be derived from these many millions of acres of land, it appears that Virginia has never received an acre of land nor a cent of money from this source. The federal government accepted by resolution this cession of Virginia containing these conditions, and is bound in law and equity to discharge the obligations of the compact made with Virginia. The United States has fully recognized her obligations to comply with all the conditions imposed in the Virginia conveyance, and cession, by fulfilling all except the one reserving to Virginia a share in the use and benefits of all these lands. Vir-

ginia should insist that this should be complied with. As a party to the compact she is the proper party to make this demand.

I commend to your most careful consideration the very valuable and interesting history of this transaction and the claims of the State of Virginia upon the Federal government, which has been so industriously and carefully compiled by Dr. Fulton. I have had no opportunity to make a careful personal examination of the statements contained in the documents submitted to me, hence I recommend that the General Assembly of Virginia refer this matter to an appropriate committee for examination and report. If the conclusions reached by that committee concur with those contained in the statements and facts presented herewith, I then recommend that the General Assembly authorize her representatives in Congress to take such action as they may think proper to have this claim of Virginia against the Federal government fairly and justly settled, and that the Attorney-General of this State be directed to co-operate with them and to take such action as he may think the best interest of Virginia demands.

I transmit with this message a full statement of the facts and conclusions obtained by Dr. Fulton in his research and investigation, with letters from Superintendent Eggleston and Dr. Fulton.

Respectfully submitted,

CLAUDE A. SWANSON,
Governor.

—Senate Journal & Documents, Va. 1910.

Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HON. WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, and HON. JOSEPH S. THURMOND ET AL., Members of the House of Delegates of the State of West Virginia,

Defendants.

REPLY BRIEF OF DEFENDANTS.

E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.

March 23, 1917.

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PRELIMINARY STATEMENT.

On the sixth of March, 1917, the State of West Virginia and the individual members of the two Houses of her Legislature moved to discharge the rule in mandamus issued herein against them, and, at the same time, filed a brief in support of their motion, and the cause was submitted without oral argument, with leave to Virginia to file a reply within ten days to West Virginia's brief, and with like leave to West Virginia, within ten days thereafter, to rejoin to such reply.

Virginia has filed her reply brief, and, after stating the history of the litigation down to the institution of the present proceeding, undertakes to state the grounds of West Virginia's motion to discharge the rule in mandamus as follows:

> "This motion rests upon an assertion that (1) this Court has no power to compel the Legislature to levy a tax for the purpose of liquidating said decree; that (2) this Court has no power to enforce the judgment by it rendered; and that (3) the issuance of a writ of mandamus would be contrary to the principles and usages of law."
>
> (Complainant's brief, bottom page 5 and top page 6.)

This is a misconception of West Virginia's brief.

ARGUMENT.

Whatever the fact may be, and whatever the opinion of counsel for West Virginia upon the subject of the enforceability of a money judgment against a State, it is incorrect to say either that West Virginia's motion to discharge the rule herein was based upon the proposition "that this Court has no power to enforce the judgment by it rendered", or that her counsel argued to that end. The rule presents no such question, and the effort was to confine the discussion to the single question raised. That question is whether or not mandamus may be numbered among the final writs, whatever they may be, that may go against a State; and the contention was that, whatever else might be done, mandamus at

least would not lie to coerce the legislative department of a State. Indeed, the argument practically conceded that a writ of execution could issue upon a judgment against a State, and could be levied upon any property that the State might own, provided the same had not been devoted to governmental purposes, and the debt satisfied therout; but, if devoted to governmental purposes, the writ would simply be returned *nulla bona*, as in the case of a judgment against a private individual who had no property subject to execution.

In order that the distinction may be clear, and the complainant's misconception italicized, we will, for the convenience of the Court, set forth again at this place the exact grounds of the defendants' motion to discharge the rule. They are:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.

4. It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.

5. Sec. 8 of Art. 8 of the West Virginia Constitution of 1863 imposed no ministerial duties upon the Legislature of the State, but only judicial and legislative duties.

6. Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.

DOES MANDAMUS LIE UNDER THE FEDERAL CONSTITUTION FROM THIS COURT TO THE LEGISLATIVE DEPARTMENT OF A STATE FOR THE PURPOSE OF COMPELLING IT TO ENACT REVENUE LAWS FOR THE CREATION OF A FUND FOR THE PAYMENT OF A JUDGMENT AGAINST THE STATE?

This presents a constitutional question of more transcendent importance than any that has been presented to this Court throughout its history. It is said, upon the one hand, to involve the integrity and efficiency of the judicial department of the Federal Government, and it is certainly true that it involves, upon the other, the existence of the States. The forty-eight States of the Union may well view the outcome with fear and trembling, for, if Virginia should be right in her contention, these States would fall into the helpless condition of purely administrative sub-divisions of the Federal Government, strip-

ped even of that partial sovereignty that was reserved unto them by the Constitution, and their capacity to exist threatened, if not destroyed. If such a writ should be proper, it would necessarily operate upon the individual members of the two Houses of the legislative department of the State, and, if they should disobey its mandate, however unsatisfactory the reason, they might lie in jail for contempt during their terms of office; and this would not bring the tax or pay the debt, but it would leave the State without a legislative department, and operate the destruction of the commonwealth. One could scarcely conceive of such a result, and certainly would not anticipate it; but, even in an obedient effort to comply with the mandate, no member would be acting as a legislator. He would not be a lawmaker, for the law would have been already made. He would exercise no choice, judgment or discretion, although clothed with the lawmaking power of the State. Every element of legislative action would be absent, as well as parliamentary procedure. The roll call would be unnecessary, for there would be no negative votes, and legislative committees would be without use, for the reason that the statute would be passed before it had been introduced. The free agency of the State in laying a purely State tax for a State purpose would be crushed and destroyed, its political power taken away, and the judiciary set in its place. Such was not the intention of the framers of the Constitution. Each government was to be supreme in its own particular sphere. and that the power of State taxation for State purposes was reserved exclusively unto the States was, and is, plainly expressed in the Tenth

Amendment to the Constitution. Such a writ, in the light of our institutions, cannot be one of the incidents of jurisdiction.

But it is insisted by counsel for the State of Virginia that Sec. 2 of Art. 3 of the Constitution gave this Court jurisdiction over "controversies between two or more States", and that the power thus given to hear and determine such controversies carries with it, as a necessary implication, the power to enforce any judgment that might be rendered in the exercise of such jurisdiction; that execution is a necessary incident to the exercise of jurisdiction; otherwise, that "judicial power" would mean "judicial impotence".

Execution is a corollary to jurisdiction, but the corollary must not be broader than its foundation. Final writs must be in accordance with the usages and customs of law, and must not violate the Constitution. They travel the beaten path, and nothing extraordinary is required. Courts are not expected to violate principle, history and the Constitution, to the end that the collection of debts may be guaranteed. Proper processes only are promised, and, if they fail, extraordinary writs cannot be expected, because not within the judicial power; for judicial power means power according to the forms of law, and that means according to the usages and principles of jurisdiction as fixed by the history of our jurisprudence. Parliamentary duties have never been interfered with by the judicial department of the government of any English speaking people; and, although our dual government presents a peculiar situation, yet we are a people with a written Consti-

tution, and the duality of that government has been hedged about by express provisions. A State that seeks a judgment against another and the enforcement thereof must not only keep within the terms of the Constitution, but must keep as well within the theory of our government, and any writ that destroys the integrity of the States is just as much *anathema* as any failure of the writ would be the other way. The whole world is in a state of ferment, and the only people therein who have any hope at all are those who have a written Constitution, lived up to. Implications are not well understood by common folks, and the stretch of the letter by implication, to the end that delegated power may swell its bounds beyond the rights reserved, would, we fear, be not only violative of the letter, but destructive of the spirit, and disastrous in the end.

No one nowadays believes in State rights in the technical sense, as originally advocated by the complainant in this cause; but there is a Constitution, with its reservations, to which we must cling; otherwise, the profoundly conceived and patriotically maintained advantages of a dual government will come to naught.

Neither would the refusal to issue a peremptory writ of mandamus in this case amount, as contended, to a declaration of "judicial incompetence", instead of "judicial power". Merely because this Court will not mandamus a legislature does not mean that it may not, in controversies between States, issue proper final processes for the enforcement of its decrees; but it would mean an unwillingness upon the part of this Court to resort, for any purpose or in any

case in its exercise of "judicial power" under the Constitution, to any writ not in conformity to the usages and customs of law, or in violation either of the spirit or the letter of the Constitution. The same final writs lie against States that lie against individuals, and they may fail of their object in the one case as well as in the other, but in each the limit of judicial power has been reached, and there has been no dereliction in its exercise at any point.

There are no unusual difficulties with respect to the enforcement of the decrees of this Court by resort to final process in the usual way, and that marks the limit of judicial power as used in the Constitution. If a controversy arises between two States involving a question of State boundary, this Court assumes jurisdiction, and applies to the solution of the controversy all the machinery and flexible orders of a court of equity, resulting in the appointment of commissioners for the purpose of ascertaining and monumenting the true boundary, followed by a final decree that extends the jurisdiction of one commonwealth to the line so established, and excludes the jurisdiction of the other from the territory thus covered; and may give final effect to this decree in a thousand and one ways, the particular way being dependent upon the character of the judicial questions that may subsequently spring thereout. Following are some of the illustrative cases:

Rhode Island v. Mass., 12 Peters, 659; 9 L. ed., 1234.

Florida v. Georgia, 17 How., 478; 15 L. ed., 181.

Missouri v. Kentucky, 11 Wallace, 395; 20 L. ed., 116.

Indiana v. Kentucky, 159 U. S., 275; 40 L. ed., 149.

Again, in the event of a final judgment or decree against a State upon bonds issued by her, and owned and held by another State, if there be collateral to secure the payment of such bonds, there is no more difficulty in subjecting this collateral in full or partial satisfaction of the decree than there would be in the case of an individual, and such was the conclusion of this Court in the case of South Dakota v. North Carolina, 192 U. S., 286.

Likewise, in the case of a mere money judgment against a State, the writ would be one of the ordinary writs of execution, and would take its course as in the case of an individual; and the exercise of judicial power involves nothing more. It neither contemplates nor promises the unusual or the forbidden, and incompetence may not be predicated upon such a situation by any one, however anxious he may be to put money above the forms of law, and superior to the Constitution.

AUTHORITIES.

In the original brief of the complainant filed in support of its *ex parte* application for the rule herein, it cited the following authorities in support of the theory that mandamus would lie in the present instance as a substitute for the ordinary process of execution to enforce the payment of a judgment like the present:

Supervisors v. U. S., 4 Wall., 435;

Von Hoffman v. City of Quincy, 4 Wall., 535;
City of Galena v. Amy, 5 Wall., 705;
Riggs v. Johnson City, 6 Wall., 166;
Walkley v. City of Muscatine, 6 Wall., 481;
Labette County Comrs. v. Moulton, 112 U. S., 217.

And then, in its reply to the brief of West Virginia in support of its motion to discharge the rule, treats these cases, or some of them, as if they had been invoked as authority by the respondents (reply brief of Virginia, page 16).

These authorities were only mentioned and discussed in the original brief of West Virginia for the purpose of showing, as therein stated, that they "are beside the question, do not meet the situation, and throw no light whatever upon it" (W. Va.'s brief, pages 12-15). This is a peculiar piece of *dialectics*, to say the least, upon the part of counsel for Virginia.

These cases, one and all, present the ordinary case of a writ of mandamus granted by a federal district or circuit court, commanding a taxing board or district, county or municipality to lay a tax pursuant to a previous legislative mandate. Not a single one of them involved the performance of a legislative or discretionary function; but ministerial agents, previously appointed for the purpose of carrying out previously enacted legislative mandates, were compelled to give effect to the antecedent legislative will.

This line of authority is well established, well known and recognized, and at no point seeks to coerce, but to effectuate, legislative will. The State was not a party in either case, and the prerogatives

of its legislative department were not sought at any point or in a single instance to be invaded or coerced. On the contrary, its will, and its will alone, was sought to be made supreme.

The authorities relied upon by West Virginia, and still insisted upon, were—

South Dakota v. North Carolina, 192 U. S., 286; 48 L. ed., 448;
Heine v. Board of Levee Comrs., 19 Wall., 655; 22 L. ed., 223;
Rees v. Watertown, 19 Wall., 107; 22 L. ed., 72;
Meriwether v. Garrett, 102 U. S., 472; 26 L. ed., 197;
Ex parte Ky. v. Dennison, 24 How., 66; 16 L. ed., 717;
Carter v. State, 42 La. Ann., 927;
People v. Morton, 156 N. Y., 136;
Ex parte Echols, 39 Ala., 698;
State v. Bolte, 151 Mo., 362.

In the first (South Dakota v. N. C.), Mr. Justice Brewer declares "the absolute inability of a court to compel a levy of taxes by the legislature" (192 U. S., 321).

In the second (Heine v. Board of Comrs.), Mr. Justice Miller uses the following language—

> "It is not only not one of the inherent powers of the Court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the State government."
> (19 Wall., 661.)

In the third (Rees v. Watertown), Mr. Justice Hunt, in speaking of the power of taxation, says—

> "It is a power that has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."
> (19 Wall., 116-7)

In the fourth (Meriwether v. Garrett), Mr. Justice Field announces that—

> "No federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the federal court, it cannot seize the power which belongs to the legislative department of the State and wield it in their behalf."
> (102 U. S., 518)

In the fifth (Ex parte Ky. v. Dennison), although Sec. 2 of Art. 4 of the Federal Constitution requires the executive authority of one State to deliver, upon the demand of the chief executive of another, fugitives from justice, and the Act of Congress of 1793 provided the regulations necessary to the execution of such constitutional provision, yet, upon the refusal of the Governor of Ohio to respond to the requisition of the Governor of Kentucky, this Court, speaking through Mr. Chief Justice Taney,

in denying a writ of mandamus against the Governor of Ohio for the purpose of compelling him to surrender the fugitive, said:

> "But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him."
> (24 How., 109-110)

The other cases (People v. Morton, Ex parte Echols and State v. Bolte) illustrate the fact that the writ of mandamus never has been, and cannot be, in English or American jurisprudence, used as a means of compelling parliamentary or legislative action.

REPUDIATION.

Counsel for Virginia (or perhaps we should say counsel for the bondholders) charge West Virginia with repudiation. This is scarcely a fair statement. It is not repudiation to resist a premature application for a writ of execution, as was successfully done in this case. Neither is it repudiation to resist an application for a mandamus which the defendant conceives to be in violation of its constitutional rights.

Respectfully submitted,

E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.

March 23, 1917.